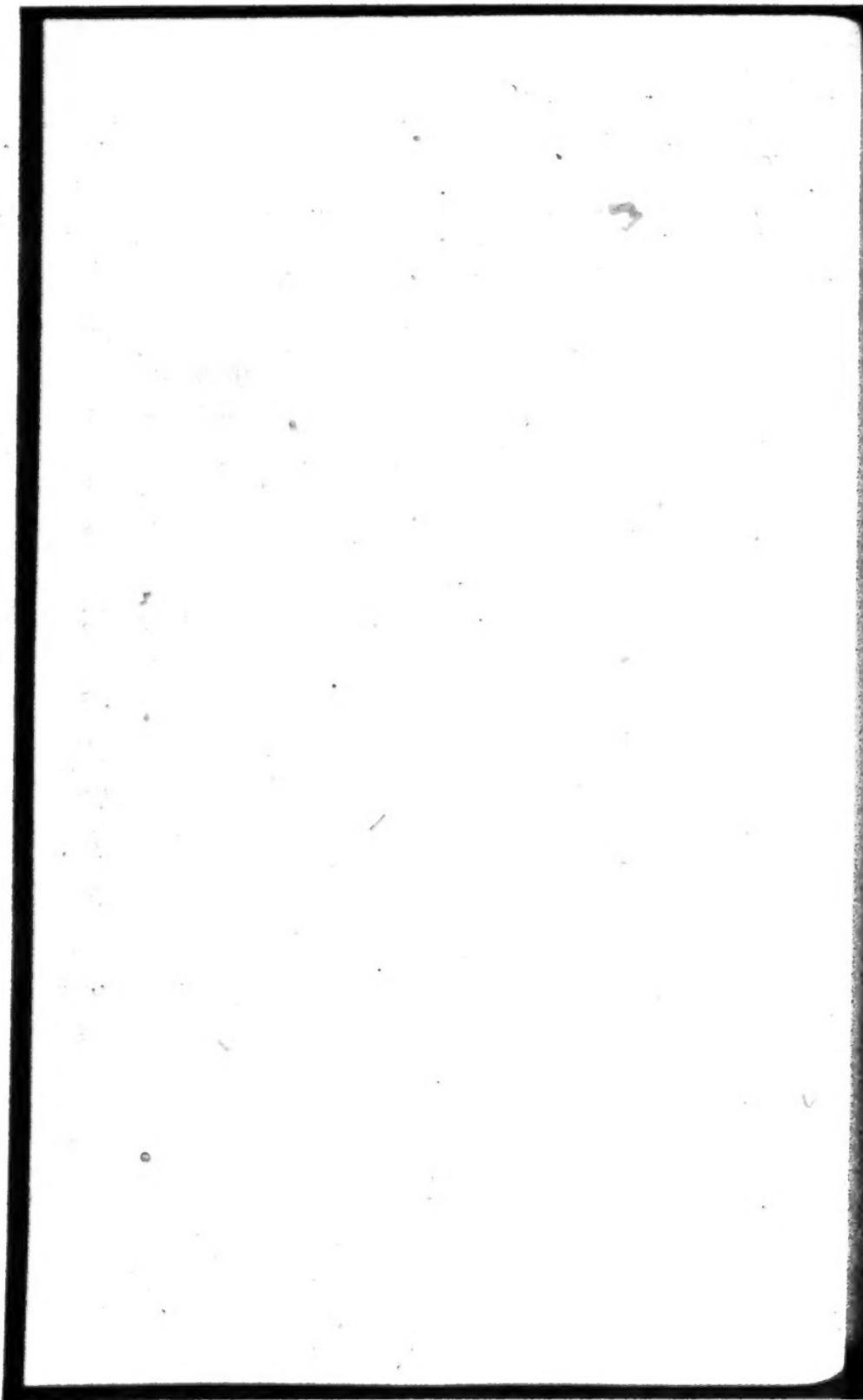


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IN THE  
**Supreme Court of the United States**

---

October Term, 1971

No. 71-36

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**STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, *et al.*,**

*Appellants,*

VS.

**ROBERT LARUE, *et al.*,**

*Appellees.*

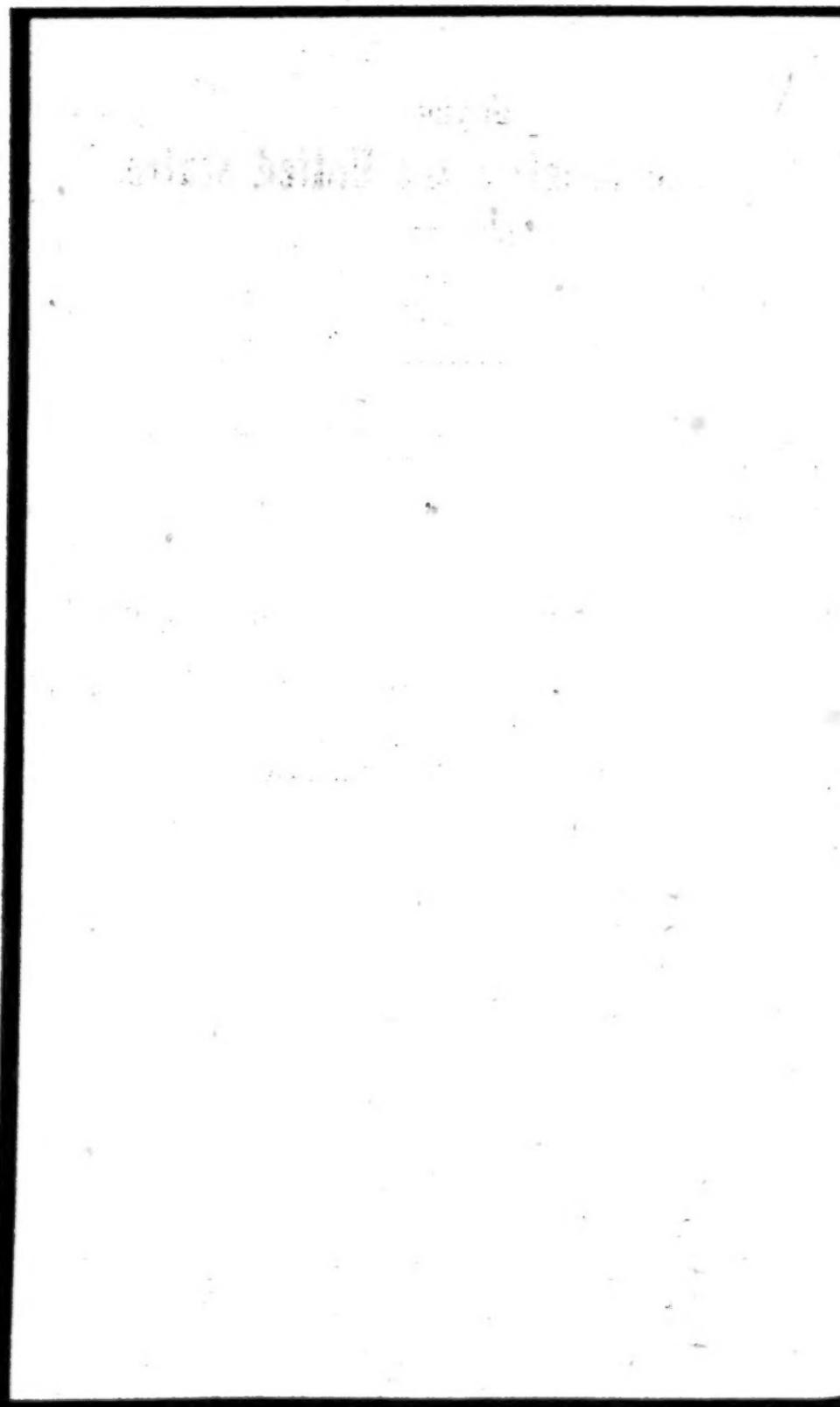
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**On Appeal From the United States District Court  
for the Central District of California.**

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**APPENDIX**

---



**Complaint for Declaratory Relief and Injunctive Relief.**

United States District Court, Central District of California.

Robert La Rue, dba The Buckit, Vito Tasselli, dba The Golden Garter, Street Combers, Inc., dba The Body Shop, La View Rose, Inc., dba Big Al's, Sailer Inn, Inc., dba The Classic Cat, Robert F. White, dba The Briar Patch, Herbert Newman, dba The Rabbit's Foot, Vinot Enterprises, Inc., dba Hi-Life Theater, Walter C. Robson, dba The Phone Booth, Petan, Inc., dba Jazz A-Go-Go, Ron Walton, dba The Whale House, The Golden Lion, Inc., dba Sir Greg's Fred Chavalier dba The Cherry Pit, Los Angeles Losers, Inc., dba The Losers, Carolina Enterprises, Inc., dba Carolina Lanes, Tommie J. Robins, dba King of Hearts, Maverick Tavern, Inc., dba The Wild Goose, King Henry VIII, Inc., dba King Henry VIII, Angelo E. Gianone and Josephine R. Van Epps, dba Gianone's Steak House, Jeri Dean, Christi Lee, Terri Wang, Judy Mohrmand, Brenda Turner, Madeline Webb, Traci Day, Bonnie Myers, Pat Dupre, Angel Rey Li En Chaing, Pauline Williams, LaSandra Mays, Sami Davis, Martha Vaughn, Jean Chanel, Carole McKelvey, Joni Allen and Louann Wells, Plaintiffs, vs. State of California, and Edward J. Kirby, Director of Alcoholic Beverage Control, Defendants. No. 70-1751-F.

Filed Aug. 10, 1970.

(1) ABC Rules 143.3(1)(a) & (c), 143.4 are Unconstitutional and in Violation of First and Fourteenth Amendments of the United States Constitution.

(2) ABC Rules 143.3(2) are Unconstitutional and in Violation of Equal Protection Clause of the United States Constitution.

(3) ABC Rules 143.3(1)(a) & (c) are Unconstitutional and in Violation of First and Fourteenth Amendments as defined in *Stanley v. Georgia* (1969) 89 S. Ct. 1243.

(4) ABC Rules, and §23089 and §23090.5 of the Business & Professions Codes are Unconstitutional as Creating "Prior Restraint" on Freedom of Speech. *Smith v. Calif.* 361 U. S. 147, 80 S. Ct. 215.

(5) ABC Rules 143.3(1)(a) & (c), 143.4, and 143.2 are Unconstitutional as to Plaintiff Dancers:

(a) No procedure to Challenge Constitutionality; and

(b) Denial of Freedom of Speech and Equal Protection of First and Fourteenth Amendments of the United States Constitution. [1]

PLAINTIFFS allege that:

I

This is an action to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fourteenth Amendments to the United States Constitution. R. S. 1979, 42 U.S.C. 1983, 42 U.S.C.A. 1983.

II

The jurisdiction of this Court is invoked under 28 U.S.C. 1343(3), this being an action as aforesated authorized by law to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is invoked as aforesaid, this being an action authorized by law under the free

speech and press provisions of the United States Constitution, and particularly the right to petition for redress of deprivations, the due process provisions and equal protection provisions of the First and Fourteenth Amendments of the United States Constitution.

### III

The value of the rights which plaintiffs in this suit seek to protect and the value of the property and property rights and the extent of the injury herein involved exceeds \$10,000.00, exclusive of interest and costs.

### IV

This is an action which also arises under the First and Fourteenth Amendments to the United States Constitution and the laws of the United States, viz., U.S.C. 1983.

### V

This is also a case where the plaintiffs are seeking a declaration of their rights under the Constitution and laws [2] of the United States, and under Title 28 U.S.C. 2201, 2202; this Court in a case of actual controversy within its jurisdiction may declare the rights of plaintiffs seeking such declaration.

### VI

This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of State Statutes by restraining the action of officers of said State in the enforcement and execution of such statutes upon the ground that the State Statutes, on their face, and as construed and applied to plaintiffs, violate the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution, and therefore, pursuant to Title 28 U.S.C. 2271, 2284,

and the application for such injunctive relief should be heard and determined by a District Court of Three Judges.

## VII

At all times herein mentioned some of the plaintiffs were and now are doing business in the City and/or County of Los Angeles, State of California, in the following manner:

- (a) ROBERT La RUE, doing business at 10909 South Hawthorne Boulevard, Lennox, California, under the fictitious firm name and style of THE BUCKIT, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;
- (b) VITO TASSELLI, doing business at 1002 North Long Beach Boulevard, Compton, California under the fictitious firm name and style of THE GOLDEN GARTER, having complied with all of the provisions of 2466-68 of the Civil Code of the State of California. [3]
- (c) STREET COMBERS, INC., doing business at 8250 Sunset Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of THE BODY SHOP, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;
- (d) La VIEN ROSE, INC., doing business at 8917 Sunset Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California,

and is doing business under the fictitious firm name and style of BIG AL'S, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(e) SAILER INN, INC., doing business at 8844 Sunset Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of THE CLASSIC CAT, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(f) ROBERT F. WHITE, doing business at 4374 East Live Oak Avenue, Arcadia, California, under the fictitious firm name and style of THE BRIAR PATCH, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(g) HERBERT NEWMAN, doing business at 5623 Hollywood Boulevard, Los Angeles, California, under the fictitious firm name and style of THE RABBIT'S FOOT, having complied with all of the provisions of [4] §2466-68 of the Civil Code of the State of California;

(h) VINOT ENTERPRISES, INC., doing business at 1758 E. Colorado Blvd., Pasadena, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of HI-LIFE THEATER, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(i) WALTER C. ROBSON, doing business at 8505 Santa Monica Boulevard, Los Angeles, California, under the fictitious firm name and style of THE PHONE BOOTH, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(j) WALTER C. ROBSON, doing business at 9018 Sunset Boulevard, Los Angeles, California, under the fictitious firm name and style of THE PHONE BOOTH, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(k) PETAN, INC., doing business at 1952 West Adams Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of JAZZ-A-GO-GO, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(l) RON WALTON, doing business at 115 West Sepulveda Boulevard, Carson, California, under the fictitious firm name and style of THE [5] WHALE HOUSE, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(m) THE GOLDEN LION, INC., doing business at 1612 Pacific Coast Highway, Harbor City, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of SIR GREGS, having complied with all of the provisions of §2366-68 of the Civil Code of the State of California;

(n) FRED CHEVALIER, doing business at 117 S. Rosemead, Pasadena, under the fictitious firm name and style of THE CHERRY PIT, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(o) LOS ANGELES LOSERS, INC., doing business at 818 N. La Cienega Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of THE LOSERS, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(p) CAROLINA ENTERPRISES, INC., doing business at 5601 Century Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of CAROLINA LANES, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California; [6]

(q) TOMMIE J. ROBINS, doing business at 11816 Aviation Boulevard, Inglewood, California, under the fictitious firm name and style of KING OF HEARTS, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(r) MAVERICK TAVERN, INC., doing business at 11604 Aviation Boulevard, Inglewood, California, is a corporation organized and existing under and pursuant to the laws of the State of

California, is doing business under the fictitious firm name and style of THE WILD GOOSE, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(s) KING HENRY VIII, INC., doing business at 13443 Crenshaw Boulevard, Hawthorne, California, is a corporation organized and existing under and pursuant to the laws of the State of California, is doing business under the fictitious firm name and style of KING HENRY VIII, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California.

(t) ANGELO E. GIANONE and JOSEPHINE R. VAN EPPS, doing business at 1453 N. Lake Ave., Pasadena, California, under the fictitious firm name and style of GIANONE'S STEAK HOUSE, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California.

## VIII

That all of the plaintiffs, night club owners, whether individual, partnership, corporation or otherwise, have a common interest in the subject matter of this action, and further, each has a right to relief in respect [7] to or arising out of the transaction complained of herein, that is to say, the challenged constitutionality of the Administrative Alcoholic Beverage Control Rules. If all of said persons herein brought separate actions the same questions of law and fact would arise in each, and said questions are common to all parties.

## IX

At all times herein mentioned, plaintiffs (described in Paragraph VII hereof,) and each of them, were and now are the operators of night clubs and/or cocktail lounges, at the addresses designated in this complaint. That each of said plaintiffs have been and do offer to such persons attending their premises, as and for entertainment, that which is known as interpretive jazz dancing. That said dancing is commonly known as "topless", "bottomless" and/or "bare buttocks" or further, sometimes referred to as "nude dancing". That said dancers have danced completely "nude", i.e., exposure of the body in an artistic expression manner.

## X

At all times herein mentioned, defendant THE STATE OF CALIFORNIA was, and now is a governmental entity, subject to suit and court process pursuant to the applicable provisions of the California Government Code.

## XI

Plaintiffs are informed and believe, and upon such information and belief, allege that at all times herein mentioned, defendant EDWARD J. KIRBY was, and now is, Director of the DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL.

## XII

At all time herein mentioned the ALCOHOLIC BEVERAGE CONTROL was and is now an agency of the State of California, [8] created by and authorized in the Constitution of the State of California. That the Rules referred to herein are statewide and have the same effect of law.

XIII

At all times herein mentioned plaintiffs, (described in Paragraph VII hereof, and each of them, held and still hold on-sale Alcoholic Beverage Licenses and/or beer licenses issued by the DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, and further, at all times herein mentioned, said licenses were and still are valid and in full force and effect.

XIV

That the various establishments belonging to the plaintiffs, (described in Paragraph VII hereof), as hereinabove alleged, are open to the public. Minors are not permitted inside the premises. Individuals employed by plaintiffs check patrons' identification to assure non-entrance of minors. The entertainment herein referred to cannot be viewed from outside of the premises, and plaintiffs have posted at their entrances a sign which states: "If you would be offended by nude entertainment do not come in". There is a further sign inside the entrance which states: "Warning This establishment offers nude entertainment. If you would be offended do not enter." Plaintiffs' signs and advertisements convey only the normal description of the entertainment, i.e., "nude dancing", and the like, and nothing more.

XV

Of or about July 10, 1970, the DEPARTMENT OF ALCOHOLIC CONTROL ADOPTED Rules 143.2, 143.3, 143.4 and 143.5, copies of which are attached hereto as Exhibits "A", "B", "C" and "D", respectively. Said Rules are to become effective [9] on August 10, 1970. That upon becoming effective, a violation of said Rules constitute a basis for the suspension or

revocation of licenses as provided by Section 24,200 (b) of the Business & Professions Code of the State of California.

## XVI

The plaintiffs, who are described in Paragraph VII hereof, as heretofore alleged, are the club owners and operators in the various night clubs and cocktail lounges of the City and/or County of Los Angeles. Said establishments are open to the public, and generally offer for sale food and/or beverages, both alcoholic and non-alcoholic. That in addition thereto, each of said establishments offers, as entertainment to its patrons, those certain form of female dances commonly known as "topless", "bottomless", and "bare buttocks". These dances are performed by dancers exposing their "bare breasts" and all other portions of their bodies to the view of the patrons. That among the various types, names and styles of dances carried on are: "Interpretive Jazz", the "Frug", the "Swim", the "Popcorn", "Walking the Dog", the "Watusi", the "Monkey", and the "Twist". Said dances consist of body movement in rhythm with popular music, completely nude. That said dances are considered to be an artistic type of dance, and they are not obscene.

## XVII

Defendant EDWARD J. KIRBY, Director of the ALCOHOLIC BEVERAGE CONTROL, his agents and servants acting in concert with him, intend to and will suspend and/or revoke the onsale alcoholic beverage licenses of plaintiffs herein on the ground that the entertainment heretofore referred to in this complaint, which is being offered by said plaintiffs, under the conditions herein stated, is in violation of or [10] violates the rules promulgated by said Department which are

attached hereto as Exhibits "A", "B", "C" and "D". Plaintiffs are informed and believe, and upon such information and belief allege that the agents, servants and employees of said EDWARD J. KIRBY will institute proceedings for the suspension or revocation of plaintiffs' licenses should plaintiffs conduct or cause to be conducted the "bottomless dancing" which has, in the past, been conducted upon their licensed premises. That plaintiffs are further informed and believe, and upon such information and belief allege that so long as the dances are "nude", regardless of whether they are obscene, that such proceedings will be instituted and that their licenses will be suspended or revoked.

### XVIII

Rules 143.3(1) (a) & (c) and 143.4 (1), (2), (3) and (4) are void and unconstitutional as applied herein and on their face in that they

- (a) prohibit nudity without regard to whether it is or is not obscene; and
- (b) prohibit acts which simulate sexual intercourse, etc., with regard to whether they are or are not obscene, or are a part of a theater performance, or not;

all in violation of the First and Fourteenth Amendments of the Constitution of the United States.

### XIX

That the various on-sale alcoholic beverage licenses owned by each of the plaintiffs (described in Paragraph VII hereof, constitutes an extremely valuable property right, and without which said plaintiffs will be deprived of their business. [11]

XX

The First Amendment to the Constitution of the United States proposed to the Legislatures of the several states by the First Congress, on September 25, 1789, and subsequently ratified and adopted as an Amendment to the Constitution of the United States, reads as follows:

“Congress shall make no law . . . abridging the freedom of speech or of the press . . .”

The rights guaranteed citizens of the United States by virtue of the First Amendment to the Constitution, have been extended to the Citizens of the several states by virtue of the Fourteenth Amendment to said Constitution as follows:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

That said rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States have been incorporated in applicable sections of the Constitution of the State of California.

XXI

The Supreme Court of the United States has held that the constitutional right of freedom of speech includes freedom of expression. Freedom of expression in-

cludes the arts, literature and entertainment such as dancing. The [12] types of dances concerned herein are included within said Constitutional guarantee.

### XXII

Said Rules, attached hereto as Exhibits "A", "B", "C" and "D" are unconstitutional and in violation of the First and Fourteenth Amendment of the Constitution of the United States in that they, and each of them, deny to plaintiffs herein their rights to freedom of speech and expression. In particular, they are unconstitutional in the manner in which they are being applied in that said State action makes mere exposure of the body or nudity, when taking place on a licensed premises, the basis of a forfeiture of the on-sale alcoholic beverage license. Said Rules as being applied herein, and on their face, form the basis of a forfeiture of personal property without due process of law. The First and Fourteenth Amendments of the Constitution of the United States, as interpreted by the Supreme Court of the United States, prohibit a State, or any state action from prohibiting activity involving freedom of expression, which is not obscene. The Constitution of the United States, as interpreted by the Supreme Court of the United States, dictates that mere nudity or exposure is not obscenity.

### XXIII

An actual controversy has arisen and now exists between plaintiffs and defendants, and each of them, relative to their respective rights, duties and obligations in that plaintiffs contend that said State Statutes and State Constitution are unconstitutional and unenforceable both on their face and as construed by plaintiffs.

XXIV

Plaintiffs, and each of them, desire a declaration of their rights with respect to the application of ALCOHOLIC BEVERAGE CONTROL Rules, Exhibits "A", "B", "C" [13] and "D", with particular reference to their constitutionality in connection with the First and Fourteenth Amendments to the Constitution of the United States of America. Such a declaration is necessary to avoid a forfeiture of each plaintiff's property rights.

XXV

Plaintiffs (described in Paragraph VII hereof) have been threatened with and are in danger of immediate irreparable injury in the form of suspension or revocation, and do intend to proceed.

XXVI

Plaintiffs, and each of them have no adequate remedy at law for the threatened impending and immediate harm and injury in that there is no civil remedy available to plaintiffs, and each of them, other than the one presently before this Court. The damages which plaintiffs, and each of them will suffer from the suspension or revocation of their liquor licenses is immeasurable and impossible to determine.

SECOND CAUSE OF ACTION

XXVII

All plaintiffs incorporate and reiterate each and all of the allegations contained in Paragraphs I through XXVI both inclusive, of their first cause of action, and make the same as part hereof as though set forth herein in full.

XXVIII

Said Fourteenth Amendment of the United States Constitution guarantees all citizens similarly situated equal protection of the laws. That Rule 143.3(2) which requires "Entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage . . . removed at least six feet from the nearest patron", deprives plaintiffs, [14] and each of them, from the following rights, privileges and immunities secured all plaintiffs by the United States Constitution, among others:

- (a) The right to be free from abridgements of freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution;
- (b) The right to be free from previous restraint and restriction of dancing and freedom of expression which is not obscene, nor otherwise unlawful, and entitled to the protective guarantees of the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution;
- (c) The right to be free from arbitrary and capricious censorship of a lawful dance entitled to the protections of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution;
- (d) The right to pursue a chosen business and occupation without arbitrary, capricious and discriminatory interference by officials of government under the "due process" provisions of the Fourteenth Amendment to the United States Constitution.

XXIX

That said Fourteenth Amendment of the United States Constitution further guarantees all citizens "due process" of the law. That as interpreted by the Supreme Court of the United States, "due process" requires that plaintiffs, and each of them, herein, be sufficiently put on notice of the prohibited conduct so that a reasonable and prudent person can, should he desire, avoid that type of conduct [15] which will render him liable for the penalties. That Rule 143.3 is so vague that a man of common intelligence must necessarily guess at its meaning and differing as to its application. That Rule 143.3(1)(a) prohibiting a licensee from permitting any person to perform acts which simulate sexual intercourse is so vague and over broad as to deny "due process" of law.

THIRD CAUSE OF ACTION

XXX

Plaintiffs, club owners, reallege and incorporate herein each and all of the allegations contained in Paragraphs I through XXVI of the first cause of action, and make the same a part hereof by reference as though fully set forth herein.

XXXI

There is a bona fide dispute between the plaintiff club owners as to whether Alcoholic Beverage Control Rules 143.3(1) (a) & (c) and 143.4 and 143.3(2) on their face and as construed and applied by defendants, are unconstitutional, null and void, in violation

of the free speech and press, "due process", equal protection of the First, Fourth and Fourteenth Amendments to the United States Constitution.

Plaintiff alleges, and defendants deny that Alcoholic Beverage Control Rules 143.3(1) (a) & (c), 143.4 and 143.3(2), on their face and as construed and applied are unconstitutional, null and void, in the following respects:

(a) The above quoted sections of the Alcoholic Beverage Control Rules purport to authorize the forfeiture of plaintiffs (described in Paragraph VII hereof), property for conducting or causing to be conducted nude dances on their premises as herein alleged without an adversary proceeding [16]

(b) The above quoted sections of the Alcoholic Beverage Control Rules purport to make it contrary to public welfare and morals and a basis of forfeiture of property to exhibit nude dancing to adults, even though no member of the public's privacy nor sensitivity is thereby offended in violation of the rule announced by the United States Supreme Court in *STANLEY V. GEORGIA*, 394 U. S. 557; see also, *STEIN V. BATCHELOR*, 300 Fed. Supp. 602 (D. C. Tex. 1969); *KARALEXIS, et al V. BYRNE, etc.*, United States District Court for the District of Massachusetts, Civil Action No. 69-655-J, unreported;

(c) The above quoted Alcoholic Beverage Control Rules purport to give to the defendants the discretion to suppress the dancing referred to herein, based upon their own subjective, arbitrary determination that same is obscene, when in fact

it has been held by the Supreme Court of the United States that nudity is not obscene.

*SUNSHINE BOOK CO. V. SUMMERFIELD,*  
(1958) 355 U. S. 372;

*EXCELLENT PUBLISHERS, INC. V.  
UNITED STATES*, (1962) 309 Fed. Rep.  
(2d) 362.

(d) The above quoted sections of the Alcoholic Beverage Control Rules purport to authorize repetitive and multiple disciplinary proceedings notwithstanding the fact that the said dances have been held to be constitutionally protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

### XXXII

Said Alcoholic Beverage Control Rules, plaintiffs' [17] Exhibits "A", "B", "C" and "D" hereof, are being applied by the defendants herein in an unconstitutional manner so as to violate the free speech and press rights of the plaintiffs as herein alleged, the rights guaranteed citizens of the United States in accordance with the First and Fourteenth Amendments of the United States Constitution. That dancing is a form of expression, protected by the First Amendment, unless obscene, that a mere nudity in a constitutionally protected dance does not remove said dance from the constitutional protection, and that said dance, must, in addition to being nude, be obscene. Defendants, and each of them, have conspired to eliminate "nude" dancing from the establishments of plaintiffs and others in the City of Los Angeles and County of Los Angeles, without regard to obscenity. That they will either

through multiple disciplinary proceedings force persons similarly situated to plaintiffs herein, into bankruptcy, discourage employees from this type of dancing so that they refuse to continue, harass plaintiffs herein through threats from exhibiting the type of dancing alleged herein, and have openly stated it is the policy of the Alcoholic Beverage Control to revoke a liquor license if someone appears on the stage nude.

#### FOURTH CAUSE OF ACTION

##### XXXIII

Plaintiffs, club owners, reallege and incorporate herein each and all of the allegations contained in Paragraphs I through XXVI of the first cause of action, and make the same a part hereof by reference as though fully set forth herein.

##### XXXIV

In 1967, the Legislature of the State of California, enacted Section 23089 of the Business & Professions [18] Code which reads as follows:

##### “REVIEW OF FINAL ORDERS; TIME AND MANNER

“Final orders of the board may be reviewed by the courts specified in Article 5 (commencing with Section 23090) of this chapter within the time and in the manner therein specified and not otherwise.”

(Added Stats. 1967, c. 1525, p. 3634, §1)

In 1967 the Legislature of the State of California, enacted Section 23090.5 of the Business & Professions Code which reads as follows:

##### “INJUNCTION; MANDAMUS

"No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

(Added Stats. 1967, c. 1525, p. 3635, §4.)

### XXXV

That the combined effect of the Alcoholic Beverage Control Rules 143.3 (1) (a) & (c); 143.3(2) and 143.4, when taken with Business & Professions Code Sections 23089 and 23090.5, are void and unconstitutional within the First and Fourteenth Amendments of the United States Constitution in that they deny plaintiffs (described in Paragraph VII hereof) "due process" of law in that they create a "prior restraint" in the exercise of the First Amendment of the United States Constitution right of freedom of speech and create a "chilling" effect thereon condemned in *SMITH V. CALIFORNIA*, 361 U.S. [19] 147; 80 S. Ct. 215; that plaintiffs are denied "due process" in that they cannot by any procedure challenge the constitutionality without first risking the loss of license. Such risk creates an unconstitutional "prior restraint" of the proper exercise of their constitutional rights to freedom of speech.

## FIFTH CAUSE OF ACTION

### XXXVI

Plaintiffs, and each of them, reallege and incorporate herein, each and all of the allegations contained in Paragraphs I through XXVI of the first cause of action, and Paragraphs XXXI and XXXII of the third cause of action, and make the same a part hereof by reference as though fully set forth herein.

### XXXVII

That petitioners JERI DEAN, CHRISTIE LEE, TERI WANG, JUDY MOHRMAND, BRANDA TURNER, MADELINE WEBB, TRACI DAY, BONNIE MYERS, PAT DUPRE, ANGEL REY, LI EN CHAING, PAULINE WILLIAMS, LaSANDRA MAYS, SAMI DAVIS, MARTHA VAUGHN, JEAN CHANEL, JONI ALLEN, CAROLE McKELVEY and LOUANN WELLS are professional dancers, and each and every one of them is employed by the various plaintiffs more particularly described in Paragraph VII hereof.

### XXXVIII

That all of the plaintiffs, dancers, have a common interest in the subject matter of this action, and further, each has a right to relief in respect to or arising out of the transaction complained of herein, that is to say, the challenged constitutionality of the Administrative Alcoholic Beverage Control Rules. If all of said persons herein brought separate actions, the same questions of law and fact would arise in each, and said questions are common to all parties. [20]

### XXXIX

All of said dancers, plaintiffs herein, earn a livelihood as "nude" dancers on the premises of plaintiffs,

club owners, and dance in a manner particularly described in Paragraphs IX and XVI and will be deprived of their livelihood should the Rules herein become effective on or after August 10, 1970.

**XL**

Said Rules, on their face, and as applied to plaintiffs, dancers herein, violate their constitutional rights under the First and Fourteenth Amendment of the United States Constitution, and denies them freedom of speech and expression.

**XLI**

That in addition thereto, the said plaintiffs referred to in this cause of action, are denied "equal protection" of the laws within the meaning of the First and Fourteenth Amendments to the United States Constitution, in that other dancers similarly situated may dance nude in theaters and/or any establishments in the State of California where alcoholic beverages are not sold.

**XLII**

In addition thereto, said dancers, being unlicensed persons, will be denied "due process" of law in that the Business & Professions Code §23089 and §23090.5 and the Alcoholic Beverage Control Rules being challenged herein, when taken together, deny them any access to the Courts of the State of California, or any relief whatsoever. That said sections, divesting the Superior Court of jurisdiction, if so interpreted, when construed with the applicable Business & Professions Code Sections, requiring exhausting of administrative remedies, leave said plaintiffs, who have a legal right and standing to sue, without any remedy for the reason that [21] they are unlicensed persons within the meaning of the Business & Professions Code. As such, they are deprived of "due process" of law. The Superior

Court has refused to hear petitioning dancers on the ground that it has no jurisdiction. The District Court of Appeal has summarily denied, without a hearing, a Petition for Writ of Mandate which embodied essentially the causes of actions filed herein. This was denied at 2:30 p.m. on Tuesday, August 4, 1970. The Supreme Court of California denied a Stay Order at 4 p.m. on Thursday, August 6, 1970, and will not decide whether they will even hear the case, or cause a hearing to be had until sometime in September, which hearing will be set, in all probability thereafter, if granted.

WHEREFORE, petitioners pray judgment against the defendants, and each of them, as follows:

1. For a temporary restraining order, a preliminary injunction and a final injunction, restraining and enjoining defendants, and each of them, their agents, servants, representatives and employees, and all persons in active concert or participating with them, from
  - (a) Enforcing Rule 143.3 of the Department of Alcoholic Beverage Control, from and after August 10, 1970;
  - (b) Enforcing Rule 143.4 of the Department of Alcoholic Beverage Control, from and after August 10, 1970.
2. For money damages as proven;
3. For such other and further relief as to the Court may seem just and proper in the premises.

LAW OFFICES OF HARRISON W.  
HERTZBERG

By /s/ Harrison W. Hertzberg  
HARRISON W. HERTZBERG  
Attorneys for Plaintiffs. [22]

DEPARTMENT OF ALCOHOLIC BEVERAGE  
CONTROL

ADOPTION OF RULE 143.2

143.2 *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

- (1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises which such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the aerola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
- (2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
- (3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.
- (4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A, D-2, F-1, F-2, G-1, G-2, I

**DEPARTMENT OF ALCOHOLIC BEVERAGE  
CONTROL**

**ADOPTION OF RULE 143.3**

**143.3 Entertainers and Conduct.** Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

- (1) No licensee shall permit any person to perform acts of or acts which simulate:
  - (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
  - (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
  - (c) The displaying of the pubic hair, anus, vulva or genitals.
- (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A, D-2, F-1, F-2, G-1, G-2, I

DEPARTMENT OF ALCOHOLIC BEVERAGE  
CONTROL

ADOPTION OF RULE 143.4

143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

- (1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
- (2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
- (3) Scenes wherein a person displays the vulva or the anus or the genitals.
- (4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

### ADOPTION OF RULE 143.5

**143.5 Ordinances.** Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.

**Effective August 10, 1970**

**Distr. A, D-2, F-1, F-2, G-1, G-2, I**

**Stipulation and Order and Amendment to Complaint.**

United States District Court, Central District of California.

Robert LaRue, et al., Plaintiffs, vs. State of California, et al., Defendants. No. 70-1751-F.

Filed Oct. 29, 1970.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the complaint herein be, and the same may be amended in accordance with the Amendment to Complaint attached hereto.

Dated: September 11, 1970.

LAW OFFICES OF HARRISON W.  
HERTZBERG

By /s/ Harrison W. Hertzberg  
Attorneys for Plaintiffs.

THOMAS C. LYNCH, Attorney  
General

By /s/ L. Stephen Porter  
Attorneys for Defendants.

**ORDER**

UPON READING AND FILING the within Stipulation, and good cause appearing therefor, it is SO ORDERED.

Dated: Oct. 29, 1970.

/s/ ILLEGIBLE  
JUDGE [1]

**Amendment to Complaint.**

United States District Court, Central District of California.

Robert La Rue, etc., et al., Plaintiffs, vs. State of California, et al., Defendants. No. 70-1751-F.

The prayer of said complaint is amended to contain the additional prayer for relief, which reads as follows:

"4. That the Court declare the respective rights and liabilities of the parties hereto under the Constitution and laws of the United States".

Other than the aforementioned amendment, plaintiffs reaffirm all of the allegations contained in said complaint.

**LAW OFFICES OF HARRISON W.  
HERTZBERG**

/s/ By Harrison W. Hertzberg  
Attorneys for Plaintiffs. [2]

State of California, County of Los Angeles—ss.

HOWARD WHITE being first duly sworn, deposes and says: I am the Secretary of CAROLINA ENTERPRISES INC., one of the plaintiffs in the above entitled action; I have read the foregoing AMENDMENT TO COMPLAINT and know the contents thereof, and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

/s/ Howard White  
HOWARD WHITE

Subscribed and sworn to before me this 10th day of September, 1970. /s/ Gussie D. Abramson, GUSSIE D. ABRAMSON, Notary Public in and for said County and State.

[Seal] [3]

**Complaint for Injunction Against Violation  
of Civil Rights.**

The United States District Court for the Central District of California.

Jerry D. Jennings, dba Sugar Shack, Erwin A. Rohm, dba Chee Chee, Raymond Rohm, dba Firehouse, Richard Carson and Robert A. Warner, dba Tuscan Room, Seemaygro, Inc., a California Corporation, dba Sarong Gals, Robert E. Poff, dba 1st King, Edward Grimes, dba The Circle, Harry J. Coleman, dba Hi Dollie and Everett L. Butts, dba The Worlock, Plaintiffs, vs. Edward J. Kirby, Director of the Department of Alcoholic Beverage Control of the State of California, John J. Canney, Assistant Director of the Department of Alcoholic Beverage Control of the State of California, John A. Kelly, Orange County District Administrator of the Department of Alcoholic Beverage Control of the State of California, James F. Meehan, Long Beach District Administrator of the Department of Alcoholic Beverage Control of the State of California, Kermit Q. Greene, Crenshaw District Administrator of the Department of Alcoholic Beverage Control of the State of California, Defendants. Civil Action No. 70-1782-HP.

Filed: Aug. 12, 1970.

Plaintiffs allege:

1. This action is brought under the Civil Rights Act, 42 USCA Sec. 1983, and 28 USCA Sec. 1343. Defendants have been and are acting under color of Rules number 143.2, 143.3, 143.4, and 143.5 of the Department of Alcoholic Beverage Control of the [1] State of California to deprive Plaintiffs and Plaintiffs' customers of their rights to free speech under the First

Amendment to the Constitution of the United States as will more fully appear hereinafter.

2. At all times mentioned herein Plaintiff JERRY D. JENNINGS, dba SUGAR SHACK, has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

3. At all times mentioned herein Plaintiff ERWIN A. ROHM dba CHEE CHEE, has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

4. At all times mentioned herein Plaintiff RAYMOND ROHM, dba FIREHOUSE, has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the

for consumption on the premises. Said premises are located in [2] the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

5. At all times mentioned herein Plaintiffs RICHARD CARSON and ROBERT A. WARNER, dba TUSCAN ROOM, have been and now are the owners and operators of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, plaintiffs have been and now are offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

6. At all times mentioned herein Plaintiff SEE-MAYGRO, INC. was and is a California Corporation duly authorized and existing under the laws of the State of California, and doing business as SARONG GALS. Said Plaintiff has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, plaintiff has been and

now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

7. At all times mentioned herein Plaintiff ROBERT E. POFF, [3] dba 1st KING, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Long Beach District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

8. At all times mentioned herein Plaintiff EDWARD GRIMES, dba THE CIRCLE, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Crenshaw District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

9. At all times mentioned herein Plaintiff HARRY J. COLEMAN, dba HI DOLLIE, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and li-

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censed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Crenshaw District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed. [4]

10. At all times mentioned herein Plaintiff EVERETT L. BUTTS, dba THE WORLOCK, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Long Beach District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

11. At all times mentioned herein, Defendant EDWARD J. KIRBY has been and now is the duly appointed Director of the Department of Alcoholic Beverage Control of the State of California.

12. At all times mentioned herein, Defendant JAMES J. CANNY has been and now is Deputy Director of the Department of Alcoholic Beverage Control of the State of California and has overall responsibility for enforcement of the Department's Rules in Southern California, including Los Angeles and Orange Counties.

13. At all times mentioned herein, Defendant JAMES J. MEEHAN has been and now is Administrator of the Long Beach District of the Department of Alcoholic Beverage Control, and has the responsibility for the enforcement of the Department's Rules therein.

14. At all times mentioned herein, Defendant KERMIT Q. GREENE has been and now is Administrator of the Crenshaw District of the Department of Alcoholic Beverage Control, and has the responsibility for the enforcement of the Department's Rules therein.

15. At all times mentioned herein, Defendant JOHN A. KELLY has been and now is Administrator of the Orange County District [5] of the Department of Alcoholic Beverage Control, and has the responsibility for the enforcement of the Department's Rules therein.

16. On or about July 9, 1970, Defendant EDWARD J. KIRBY, acting in his official capacity, caused the Department of Alcoholic Beverage Control of the State of California to adopt and promulgate a set of four rules, designated as Rule 143.2, "Attire and Conduct"; Rule 143.3, "Entertainers and Conduct"; Rule 143.4 "Visual Displays"; and Rule 143.5, "Ordinances." Said rules became effective on or about August 10, 1970. A true and correct copy of said rules is attached hereto as Exhibit "A" and incorporated herein by reference.

17. Said Rules deprive Plaintiffs of their right to free speech under the First Amendment to the Constitution of the United States because they prohibit any Plaintiff from presenting any form of live entertainment or showing any pictures in which persons are not dressed in the manner required by said Rules or by any local ordinance, or in which persons engaged in

any of the acts or simulate any of the acts prohibited by said Rules, whether or not the live entertainment or pictures are obscene and whether or not such Plaintiff has knowledge thereof. Said Rules further deprive Plaintiffs of their right to free speech because they regulate the manner in which live entertainment may be presented in their licensed premises without such regulations being necessary to fulfill a compelling public purpose. Said Rules further deprive Plaintiffs' customers of their rights of free speech because their enforcement against Plaintiffs will deny said customers the right to watch and witness the entertainment and other communication prohibited thereby and because said Rules indirectly regulate and limit the exercise of free speech by said patrons.

18. Plaintiffs will suffer irreparable injury if said Rules [6] remain in effect or are enforced against them. If any of the Plaintiffs cease to present entertainment or pictures featuring nude persons each of said Plaintiffs will be permanently deprived of substantial income which is now generated by such entertainment. If any of the Plaintiffs refuse or fail to comply with said Rules, Defendants will cause disciplinary action to be taken against such Plaintiff, thereby subjecting him to revocation or suspension of his license to sell alcoholic beverages. Defendants will not suffer any damage or injury if enjoined from enforcing said Rules.

19. Plaintiffs are informed and believe that the Department of Alcoholic Beverage Control, acting by and through Defendants, intends to enforce said Rules on and after August 10, 1970 unless enjoined from so doing by an Order of this Court.

WHEREFORE, Plaintiffs demand a three-judge District Court be convened and that:

1. A preliminary and final injunction be issued ordering defendants, their agents, servants, employees, subordinants, attorneys, and all other persons in active concert or participation with them be and hereby are temporarily restrained from directly or indirectly:

(a) Investigating or collecting any information concerning alleged violations of Rules 143.2, 143.3, 143.4 and 143.5 of the Department of Alcoholic Beverage Control;

(b) Filing any accusations or orders or taking any other action directed toward suspending or revoking plaintiffs' licenses to sell alcoholic beverages or imposing any penalty in respect thereof for any alleged violation of said rules;

(c) Enforcing or otherwise seeking compliance by Plaintiffs or others with the requirements of said Rules.

[7]

2. Plaintiffs be awarded their costs of suit, and such other and further relief as the Court deems just.

LAW OFFICES OF BERRIEN E.  
MOORE

By: /s/ Kenneth Scholtz

KENNETH SCHOLTZ

Attorneys for Plaintiffs [8]

**DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL**

**ADOPTION OF RULE 143.2**

**143.2. Attire and Conduct.** The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

- (1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
- (2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
- (3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.
- (4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

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## DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

### ADOPTION OF RULE 143.3

143.3. *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

- (1) No license shall permit any person to perform acts of or acts which simulate:
  - (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
  - (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
  - (c) The displaying of the pubic hair, anus, vulva or genitals.
- (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I [10]

**DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL**

**ADOPTION OF RULE 143.4**

143.4 *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

- (1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
- (2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
- (3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

#### ADOPTION OF RULE 143.5

143.5 *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I [11]

#### VERIFICATION

State of California, County of Los Angeles—ss.

ROBERT E. POFF, being sworn, says:

That he is one of the plaintiffs in the foregoing action; that he has read the COMPLAINT and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes them to be true.

Dated: August 11, 1970.

/s/ Robert E. Poff  
ROBERT E. POFF

Subscribed and sworn to before me on August 11,  
1970. /s/ Lana M. Fritz, Notary Public in and for  
said County and State.

[Seal] [12]

**First Amended Complaint for Declaratory Relief  
and Injunctive Relief.**

United States District Court, Central District of California.

Don Mac Lean dba The Scorpio, et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control of the State of California; Edward J. Kirby, as Director of the Department of Alcoholic Beverage Control, Defendants. No. 70-1770-F.

Filed: Sept. 17, 1970.

Plaintiffs allege:

1. The jurisdiction of this Court over this action is invoked under Title 28 U.S.C. 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000.00; and, arises under the Constitution and laws of the United States, and particularly the First and Fourteenth Amendments to the United States Constitution.

2. This action is also brought to redress by injunctive relief the deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs by the Constitution of the United States, and particularly the First and Fourteenth Amendments thereto (42 U.S.C. 1983).

3. This is also a case where the Plaintiffs are seeking [1] a declaration of their rights under the Constitution and laws of the United States; and under Title 28 U.S.C. 2201 and 2202, this Court in a case of actual controversy within its jurisdiction may declare the rights of Plaintiffs seeking such declaration.

4. This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of Department of Alcoholic Beverage Control

Rules by restraining the Department of Alcoholic Beverage Control and director and their agents, servants or employees in the enforcement and execution of such rules based upon the ground that the rules, on their face and as applied to these Plaintiffs, violate the provisions of the First and Fourteenth Amendments to the United States Constitution and therefore, pursuant to Title 28 U.S.C. 2281 and 2284, the application for such injunctive relief should be heard and determined by a District Court of Three Judges.

5. Plaintiffs' loss of revenue, if the execution of the rules are not enjoined, will be in excess of \$10,000.00, exclusive of interest and costs.

6. Plaintiff, DON MAC LEAN, has at all times been doing business at 11314 Vanowen, North Hollywood, California, under the fictitious name THE SCORPIO, having duly complied with all of the provisions of Sections 2466-68 of the Civil Code of the State of California.

7. The other Plaintiffs are joined pursuant to Federal Rules of Civil Procedure Section 20A in that all Plaintiffs have a common interest in the subject matter and have identical questions of fact and law. The other Plaintiffs joined are identified as to name, capacity, address and California Civil Code 2466-68 compliance in Exhibit "B", a copy of which is attached hereto and incorporated herein as if fully set forth at length.

8. Plaintiffs have at all times held and still hold on-sale liquor licenses and/or beer licenses issued by Defendant [2] DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA ("Department"); and that at all times said

licenses were and still are valid and in full force and effect.

9. Plaintiffs' business is that of exhibiting pictorial nude entertainment and presenting interpretative nude dancing for the enjoyment and amusement of adult customers visiting Plaintiffs' said business premises, all of which entertainment is not obscene. Said dancing is commonly known as "topless" and/or "bottomless" and, in rhythm with popular music, is choreographed as the "frug", the "swim", the "popcorn", "walking the dog" and the "watusi". Plaintiffs provide further entertainment by employing "topless waitresses" to serve food and beverages to Plaintiffs' adult customers.

10. Plaintiffs' business, in offering such entertainment in a cafe-restaurant atmosphere, is compatible with the socio-economic structure of today's inner city. The modern cafe-restaurant, in contributing to and encouraging social communications (political, business or entertainment), is more popular than the most elaborate convention or recreation facility.

11. The entertainment herein referred to cannot be viewed from without Plaintiffs' premises, and Plaintiffs have posted signs at the entrance which state: "WARNING: THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED, DO NOT ENTER." Plaintiffs' entertainment is not made available to children and does not intrude upon the sensitivities or privacy of the general public. In offering such artful entertainment, Plaintiffs are exercising fundamental rights of free expression, as guaranteed by the Federal Constitution.

12. That on July 9, 1970, the Department duly adopted Rules 143.2, 143.3, 143.4 and 143.5, becom-

ing effective August 10, 1970. The said rules apply to Plaintiffs' business and regulate the dress and conduct of waitresses and entertainers, and the [3] exhibition of motion and still pictures. A complete and accurate copy of said Rules is attached hereto as Exhibit "A" and incorporated herein by reference.

13. That Defendants have threatened to enforce and prosecute, and do now threaten to enforce and prosecute, Rules 143.2-143.5 to prevent Plaintiffs from offering and providing their said entertainment.

14. That violations of any and all of said Rules will subject Plaintiffs' said Alcoholic Beverage Licenses to revocation by Defendant under Business and Professions Code 24200, which provides in pertinent part as follows:

"The following are the grounds which constitute a basis for the suspension or revocation of licenses:  
(b) . . . The violation or the causing or the permitting of a violation by a licensee of . . . any Rules of the Department. . . ."

15. That violations of any or all of said Rules will subject Plaintiffs to arrest, prosecution, conviction, fine and/or imprisonment by Defendants under the Business and Professions Code, which provides in pertinent part as follows:

"Sec. 25617. Every person convicted for a violation of any of the provisions of this division for which another penalty or punishment is not specifically provided for in this division is guilty of a misdemeanor and shall be punished by a fine of not more than Five Hundred Dollars (\$500) or by imprisonment in the County Jail for not more than 6 months, or by both such fine and imprisonment."

“Sec. 25619. Every peace officer and every [4] District Attorney in this State shall enforce the provisions of this division and shall inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this division. Every such officer refusing or neglecting to do so is guilty of a misdemeanor.”

16. That Plaintiffs will suffer great irreparable damage, injury and harm by the enforcement and prosecution, and threatened enforcement and prosecution, by Defendants of Rules 143.2-143.5 in that the following shall immediately result:

- (a) Suppressing and censoring Plaintiffs' right to free expression, amusement and entertainment under the Federal Constitution;
- (b) Impeding and preventing Plaintiffs from engaging in the lawful business of offering and providing expression, amusement and entertainment;
- (c) Depriving Plaintiffs of gain and profit to be derived from the operation of their said businesses;
- (d) Depriving Plaintiffs of property through the revocation of their on-sale alcoholic beverage licenses;
- (e) Subjecting Plaintiffs to the threat, fear and fact of repeated and numerous accusations for the violation of said Rules, and to the inconvenience and expense of defending against repeated and numerous administrative hearings for the [5] violation of said Rules;

- (f) Subjecting Plaintiffs to the threat, fear and fact of repeated and numerous arrests for the violation of said Rules, to the inconvenience and expense of defending against repeated and numerous prosecutions for the violation of said Rules, and to the threat fear and fact of repeated and numerous fines and/or imprisonments for the violation of said Rules; and
- (g) Depriving Plaintiffs of their good reputation as law abiding citizens.

17. Plaintiffs have no other plain, speedy or adequate remedy at law, Section 23090.5 of the Business and Professions Code providing as follows:

"No Court of this State, except the Supreme Court and the Court of Appeal to the extent specified in this Article, shall have jurisdiction to review, affirm, reverse, annul or correct any Order, Rule or Decision of the Department or to suspend, stay or delay the operation or execution thereof, or to restrain, enjoin or interfere with the Department in the performance of its duties, but a Writ of Mandate shall lie from the Supreme Court or the Courts of Appeal in any proper case."

18. Plaintiffs petitioned the Court of Appeal, Second Appellate District, for a Writ of Mandate in this matter (Second Civil No. 37007). That on August 6, 1970, the said Petition to Court of Appeal was summarily denied. [6]

19. Plaintiffs on August 7, 1970, petitioned the Supreme Court of the State of California for a Writ of Mandate in this matter (Civil Matter No. 37007).

That on September 3, 1970, the said Petition to the Supreme Court was summarily denied.

20. Plaintiffs have not exhausted the administrative remedies that may be available by law because same are inadequate, and to do so would cause irreparable injury in that Plaintiffs would be subject to an unconstitutional prior restraint as recognized under the doctrine of *Freedman v. Maryland*, 380 U.S. 51, and *Burton v. Municipal Court*, 68 C.2d 684.

21. The Defendant, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, is the administrative agency duly empowered and vested with the authority to license and discipline businesses such as Plaintiffs.' The Defendant, EDWARD J. KIRBY, is the Director of Defendant Department.

22. Plaintiffs contend and Defendant denies that the said Rules are void, unconstitutional and beyond the Department's jurisdiction for each and all of the following reasons:

- (a) The Rules violate the First, Fourth, Fifth, Ninth and Tenth Amendments to the Constitution of the United States;
- (b) Article 20, Section 22 of the California Constitution and Business and Profession Code Section 24200 is an excessive grant of power to the Department for the regulation of activities protected by the First Amendment to the Constitution of the United States;
- (c) California law does not assume Plaintiffs an adequate and prompt judicial determination of First Amendment expression; [7]

- (d) The Rules violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;
- (e) The Department's Rules have no real and substantial relation to public welfare and morals under the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs pray that:

1. For a judicial declaration stating that Department of Alcoholic Beverage Control Rules No. 143.2-143.5 are unconstitutional, null and void as violative of the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.
2. That a permanent injunction issue restraining and enjoining the Defendants, their agents, servants and employees, directly or indirectly, from enforcing Alcoholic Beverage Control Rules 143.2-143.5.
3. That pending hearing on the permanent injunction, a preliminary injunction and temporary restraining order issue restraining and enjoining Defendants, their agents, servants and employees from directly or indirectly enforcing Department of Alcoholic Beverage Control Rules 143.2-143.5.
4. For convening of a three Judge statutory district court pursuant to Title 28 U.S.C. 2281 and 2284. [8]
5. For such other and further relief as this Court deems just and proper.

WARREN I. WOLFE and

DONALD J. BOSS

By /s/ Warren I. Wolfe

WARREN I. WOLFE

Attorneys for Plaintiff [9]

**VERIFICATION**

State of California, County of Los Angeles—ss.

I am one of the Plaintiffs regarding the above-captioned matter. I have read the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF, and I do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ Richard Primm  
**RICHARD PRIMM**

Subscribed and sworn to before me this 16 day of September, 1970. /s/ Donald J. Boss, Notary Public of the State of California.

[Seal] [10]

**DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL**

**ADOPTION OF RULE 143.2**

143.2. *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

- (1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
- (2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
- (3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.
- (4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

## DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

### ADOPTION OF RULE 143.3

**143.3 Entertainers and Conduct.** Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

- (1) No licensee shall permit any person to perform acts of or acts which simulate:
  - (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
  - (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
  - (c) The displaying of the pubic hair, anus, vulva or genitals.
- (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL

ADOPTION OF RULE 143.4

143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

- (1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
- (2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
- (3) Scenes wherein a person displays the vulva or the anus or the genitals.
- (4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

### ADOPTION OF RULE 143.5

143.5 *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

Robert T. Richardson dba  
The Peacemaker  
5540 & 5540½ Reseda Boulevard  
Tarzana, California 91356  
881-9009

Theresa Enterprises, Inc. dba  
The Hello Doll  
10910 Magnolia Boulevard  
North Hollywood, California 91601  
984-2400 & 877-4000

1738 Corporation, Inc. dba  
El Rancho Club  
1738 West 7th Street  
Los Angeles, California 90017  
483-5715

Satin Doll Corporation, dba  
The Basement  
5503 Lankershim Boulevard  
North Hollywood, California 91601  
769-5302

Joseph Acosta dba  
The Inferno  
11308 Vanowen  
North Hollywood, California 91605  
985-5866

Don Mac Lean dba  
The Scorpio  
11314 Vanowen  
North Hollywood, California 91605  
980-4723

**John Chiampas dba  
Batman A-Go-Go  
21516 Sherman Way  
Canoga Park, California 91303  
887-6744**

**George Triant dba  
Swinging Pussycat  
18518 Sherman Way  
Reseda, California  
881-9578**

**Gus Sliankos dba  
Candy Cat  
21625 Devonshire  
Chatsworth, California 91311  
882-9663**

**Aristides E. Skartsaris dba  
Laugh Inn  
21125 Sherman Way  
Canoga Park, California 91303  
340-9739**

**Don and Alka Smith dba  
The Hayloft  
7550 Sepulveda  
Van Nuys, California 91405  
787-9861**

**Betty Drowatzky dba  
The Red Witch  
4838 Lankershim Boulevard  
North Hollywood, California 91601  
980-4706**

Rag Time of Calif., Inc. dba  
Rabbits Foot  
5925 Franklin Avenue  
Los Angeles, California 90028  
464-9833

Roy Jones dba  
The Doll House  
8250 White Oak Avenue  
Northridge, California 91324  
881-9869

1170 Baker Corp. dba  
Honey Bunny  
5667 Lankershim Boulevard  
North Hollywood, California 91601  
769-9854

Garry R. Holt dba  
Bottoms Up  
5955 Van Nuys Boulevard  
Van Nuys, California 91405  
785-9010

5512 Sunset, Inc. dba  
Batcave  
5521 Sunset Boulevard  
Hollywood, California 90028  
464-9544

5651 Hollywood, Inc. dba  
Honey Bunny  
5336 Sunset Boulevard  
Los Angeles, California 90027  
462-9887

15110 East Ramona Corp. dba  
Cats Meow.

15110 East Ramona  
Baldwin Park, California  
337-9263

67 Sunset Strip Corporation dba  
Melody Room  
8852 Sunset Boulevard  
Los Angeles, California 90069  
652-9328

Mary Anne Jones Enterprises dba  
Monty's  
1222 West 7th Street  
Los Angeles, California 90017  
628-8582

Daniel L. Tucker dba  
Topaz Cafe  
2055 East 7th Street  
Los Angeles, California 90021  
623-2787

Richard Primm dba  
The Fox  
250 North Virgil Avenue  
Los Angeles, California 90000  
386-0060

William Kredell & Errel De Haan dba  
The Gas Buggy  
19657 Ventura Boulevard  
Tarzana, California  
342-3822

413 Sobrand Inc. dba  
The Zipper Club  
413 South Brand Boulevard  
Glendale, California  
462-6855

Stanley Egan dba  
The Vanity Box  
12135 Riverside Drive  
North Hollywood, California  
769-6323

Paul Perrier dba  
Heads & Tails  
21603 Devonshire  
Chatsworth, California  
882-2064

Irving Goldstein dba  
Sherwood Forest  
2742 Rowena Avenue  
Los Angeles, California 90039  
664-9844

David Heaps dba  
Honey Bucket  
5071 Melrose  
Los Angeles, California  
464-9908

Solomon Schneider dba  
Dangler  
5643 Cahuenga Blvd.  
Los Angeles, California  
769-8894

Jack Weinstein dba  
Rawhide  
14436 Victory Boulevard  
Van Nuys, California  
787-9561

Mel Davis dba  
Switch Inn  
7301-½ Van Nuys Boulevard  
Van Nuys, California 91405  
787-9547 & 780-5244

Gus Peters dba  
Orchid Gal  
1931 West Sixth Street  
Los Angeles, California 90017  
483-8403

Martin Steinberg dba  
The Hideout  
7707 Sepulveda Boulevard  
Van Nuys, California 91405  
781-9687

**Stipulation and Order to Amend Answer.**

United States District Court, Central District of California.

Robert La Rue, et al., Plaintiffs, v. State of California, et al., Defendants. No. 70-1751-F

Filed: Oct. 19, 1970.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the answer herein be, and the same may be amended in accordance with the First Amended Answer attached hereto.

DATED: October 19, 1970.

LAW OFFICES OF HARRISON  
W. HERTZBERG  
By /s/ ILLEGIBLE

THOMAS C. LYNCH

Attorney General

/s/ L. Stephen Porter  
L. STEPHEN PORTER  
Deputy Attorney General  
Attorneys for Defendants

**ORDER**

Upon reading and filing the within Stipulation, and good cause appearing therefor, it is SO ORDERED.

DATED: Oct. 19, 1970

By /s/ ILLEGIBLE  
JUDGE

**First Amended Answer.**

**United States District Court of the Central District of California.**

Robert La Rue, dba The Buckit; Vito Tasselli, dba The Golden Garter; Street Combers, Inc., dba The Body Shop; La Vien Rose, Inc., dba Big Al's; Sailer Inn, Inc., dba The Classic Cat; Robert F. White, dba The Briar Patch; Herbert Newman, dba The Rabbit's Foot; Vinot Enterprises, Inc., dba Hi-Life Theater; Walter C. Robson, dba The Phone Booth; Petan, Inc., dba Jazz A-Go-Go; Ron Walton, dba The Whale House; The Golden Lion, Inc., dba Sir Greg's; Fred Chevalier, dba The Cherry Pit; Los Angeles Losers, Inc., dba The Losers; Carolina Enterprises, Inc., dba Carolina Lanes; Tommie J. Robins, dba King of Hearts; Maverick Tavern, Inc., dba The Wild Goose; King Henry VIII, Inc., dba King Henry VIII; Angelo E. Gianone and Josephine R. Van Epps, dba Gianone's Steak House; Jeri Dean; Christi Lee; Teri Wang; Judy Mohrmand; Brenda Turner; Madeline Webb; Traci Day; Bonnie Myers; Pat Dupre; Angel Rey Li En Chaing; Pauline Williams; LaSandra Mays; Sami Davis; Martha Vaughn; Jean Chanel; Carole McKelvey; Joni Allen; and Louann Wells, Plaintiffs v. State of California, and Edward J. Kirby, Director of Alcoholic Beverage Control, Defendants. No. C-70 1751-F [1]

COME NOW the defendants and make this their First Amended Answer to the complaint filed herein

and for such Answer admit, deny and allege as follows:

#### FIRST CAUSE OF ACTION

1. Admit the allegations contained in Paragraphs I through VIII, inclusive, X through XIII, inclusive, XV, XVII, XX, XXIII, XXV, and XXVI.
2. Answering Paragraph IX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.
3. Answering Paragraphs XV and XVI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein save and except to admit that the plaintiffs' establishments are open to the public.
4. Deny the allegations contained in Paragraphs XVIII, XIX, XXI, and XXII.
5. Answering Paragraph XXIV, admit the allegations contained therein save and except defendants deny this action involves a threatened forfeiture of a property right.

#### SECOND CAUSE OF ACTION

6. Answering Paragraph XXVII, defendants incorporate by reference and make a part hereof, the same as if fully set forth herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

7. Deny the allegations concerning Rule 143.3 in Paragraphs XXVIII and XXIX.

### THIRD CAUSE OF ACTION

8. Answering Paragraph XXX, defendants incorporate by reference and make a part hereof, the same as if fully set forth [2] herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

9. Answering Paragraph XXXI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first paragraph of Paragraph XXXI; deny the allegations contained in the second paragraph of Paragraph XXXI.

10. Deny the allegations contained in Paragraph XXXII.

### FOURTH CAUSE OF ACTION

11. Answering Paragraph XXXIII, defendants incorporate by reference and make a part hereof, the same as if fully set forth herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

12. Admit the allegations contained in Paragraph XXXIV.

13. Deny the allegations contained in Paragraph XXXV.

### FIFTH CAUSE OF ACTION

14. Answering Paragraph XXXVI, defendants incorporate by reference and make a part hereof, the same as if fully set forth herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

15. Admit the allegations contained in Paragraphs XXXVII and XXXVIII.

16. Answering Paragraph XXXIX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

17. Deny the allegations contained in Paragraph XL and XLI.

18. Answering Paragraph XLII, deny the allegations [3] contained therein save and except those pertaining to the prior actions of the state courts of California.

### FIRST AFFIRMATIVE DEFENSE

Defendants are immune from suit under the Civil Rights Statutes.

### SECOND AFFIRMATIVE DEFENSE

Plaintiff corporations are not within the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and do not have standing to sue for alleged violations thereof.

### THIRD AFFIRMATIVE DEFENSE

Plaintiffs have standing to sue only for alleged violations of their civil rights, plaintiffs do not have standing to sue for the alleged violations of the civil rights of other persons.

WHEREFORE, defendants pray that sections 143.3 and 143.4 of Title IV of the California Administrative Code be declared valid; that plaintiffs be denied a preliminary and a permanent injunction; that plaintiffs be denied money damages; and that defendants be awarded the costs of suit incurred herein and for such other and further relief as the Court deems just and proper in the premises.

DATED: October 16, 1970

THOMAS C. LYNCH,  
Attorney General  
/s/ L. Stephen Porter

L. STEPHEN PORTER  
Deputy Attorney General  
Attorneys for Defendants [4]

**Answer.**

United States District Court, Central District of California.

Jerry D. Jennings, dba Sugar Shack, Erwin A. Rohm, dba Chee Chee, Raymond Rohm, dba Firehouse, Richard Carson and Robert A. Warner, dba Tuscan Room, Seemaygro, Inc., a California Corporation, dba Sarong Gals, Robert E. Poff, dba 1st King, Edward Grimes, dba The Circle, Harry J. Coleman, dba Hi Dollie and Everett L. Butts, dba The Worlock, Plaintiffs, v. Edward J. Kirby, Director of the Department of Alcoholic Beverage Control of the State of California, John J. Canney, Assistant Director of the Department of Alcoholic Beverage Control of the State of California, John A. Kelly, Orange County District Administrator of the Department of Alcoholic Beverage Control of the State of California, James F. Meehan, Long Beach District Administrator of the Department of Alcoholic Beverage Control of the State of California, Kermit Q. Greene, Crenshaw District Administrator of the Department of Alcoholic Beverage Control of the State of California, Defendants. Civil No. 70-1782-F.

Filed: Sep. 30, 1970.

Come now the defendants and make this their Answer to the complaint filed herein and for such Answer admit, deny and allege as follows:

1. Answering Paragraph 1, admit the allegations [1] contained therein save and except defendants deny that they are acting to deprive plaintiffs or plaintiffs' customers of their rights to free speech.
2. Admit the allegations contained in Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 19.
3. Deny the allegations contained in Paragraph 17.

4. Answering Paragraph 18, admit the allegations contained therein save and except defendants' allegation that they will not suffer damage or injury if enforcement of the Rules.

### FIRST AFFIRMATIVE DEFENSE

Defendants are immune from suit under the Civil Rights Statutes.

### SECOND AFFIRMATIVE DEFENSE

Plaintiff corporations are not within the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and do not have standing to sue for alleged violations thereof.

### THIRD AFFIRMATIVE DEFENSE

Plaintiffs have standing to sue only for alleged violations of their civil rights, plaintiffs do not have standing to sue for the alleged violations of the civil rights of other persons.

WHEREFORE, defendants pray that Sections 143.3, 143.4, and 143.5 of Title 4 of the California Administrative Code be declared valid, that plaintiff be denied a preliminary and a permanent injunction and that defendant be awarded the costs of attorney incurred herein and for such [2] other and further relief as the Court deems just and proper in the circumstances.

DATED: SEPTEMBER 28, 1970

THOMAS C. LYNCH,

Attorney General

of the State of California

/s/ L. Stephen Porter

L. STEPHEN PORTER, Deputy Attorney General

Attorneys for Defendants [3]

Atto-

**Stipulation and Order to Amend Answer.**

United States District Court, Central District of California.

Don Mac Lean dba The Scorpio, et al., Plaintiffs,  
vs. The Department of Alcoholic Beverage Control of  
the State of California, Edward J. Kirby, as Director  
of the Department of Alcoholic Beverage Control, De-  
fendants. Civil No. 70-1770-F

Filed: Oct. 19, 1970.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the answer herein be, and the same may be amended in accordance with the First Amended Answer attached hereto.

DATED: October 19, 1970.

WARREN I. WOLFE and  
DONALD J. BOSS  
By /s/ DONALD J. BOSS  
Attorneys for Plaintiffs

THOMAS C. LYNCH  
Attorney General  
/s/ L. Stephen Porter  
L. STEPHEN PORTER  
Deputy Attorney General  
Attorneys for Defendants

**ORDER**

Upon reading and filing the within Stipulation, and good cause appearing therefor, it is SO ORDERED.

DATED: Oct. 19, 1970

/s/ ILLEGIBLE  
JUDGE

## FIRST AMENDED ANSWER

United States District Court, Central District of California.

Don Mac Lean dba The Scorpio, et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control of the State of California, Edward J. Kirby, as Director of the Department of Alcoholic Beverage Control, Defendants. Civil No. 70-1770-F

Come now defendants and make this their Answer to the amended complaint filed herein and for such Answer admit, deny and allege as follows:

1. Admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19 and 21.
2. Deny the allegations contained in paragraphs 10, 15, 16, 20 and 22.
3. Answering paragraphs 9 and 11, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein save and except defendants deny that plaintiffs are exercising rights of free expression. [1]

## FIRST AFFIRMATIVE DEFENSE

Defendants are immune from suit under the Civil Rights Statutes.

## SECOND AFFIRMATIVE DEFENSE

Plaintiff corporations are not within the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and do not have standing to sue for alleged violations thereof.

### THIRD AFFIRMATIVE DEFENSE

Plaintiffs have standing to sue only for alleged violations of their civil rights, plaintiffs do not have standing to sue for the alleged violations of the civil rights of other persons.

WHEREFORE, defendants pray that sections 143.2, 143.3, 143.4 and 143.5 of Title IV of the California Administrative Code be declared valid, that plaintiffs be denied a preliminary and a permanent injunction, and that defendants be awarded the costs of suit incurred herein and for such other and further relief as the court deems just and proper in the premises.

DATED: October 16, 1970.

THOMAS C. LYNCH

Attorney General

/s/ L. Stephen Porter

L. STEPHEN PORTER

Deputy Attorney General

Attorneys for Defendants [2]

**Pretrial Order.**

United States District Court, Central District of California.

Robert La Rue, etc., et al., Plaintiffs, vs. State of California, et al., Defendants. Civ. No. 70-1751-F.

Don Mac Lean, etc., et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control, Etc., Defendants. Civ. No. 70-1770-F. [1]

Jerry D. Jennings, etc., et al., Plaintiffs, vs. Edward J. Kirby, etc., et al. Defendants. Civ. No. 70-1782-F.

Following pretrial proceedings, pursuant to Rule 16 of the Federal Rules of Civil Procedure, and Local Rule 9 of this Court,

**IT IS ORDERED:**

**I**

These are civil actions brought by plaintiffs against the defendants for a declaration as to the constitutionality of certain regulations enacted by the defendants, and for injunctive relief with respect thereto. Plaintiffs allege that the regulations deprive them of certain rights, privileges and immunities secured to them by the Constitution and laws of the United States.

The parties to this action are as follows:

Plaintiffs consist of two groups: (1) individual, partnership and corporate California Alcoholic Beverage Licensees, and (2) individual dancers employed on licensed alcoholic beverages premises by group (1).

Defendants are the Department of Alcoholic Beverage Control of the State of California and its Director.

The pleadings which raise the issues herein are the Complaints and the Answers. [2]

ROBERT La RUE, etc., et al. v. STATE OF CALIFORNIA, #70-1751-F, DON MAC LEAN, etc., et al., v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ETC., #70-1770-F, and JERRY D. JENNINGS, etc., et al., v. EDWARD J. KIRBY, etc., et al., #70-1782-F, are hereby consolidated for trial.

II

Federal jurisdiction and venue are invoked upon the following grounds:

(1) These are actions brought pursuant to 28 U.S.C.A. 1343, 28 U.S.C.A. 1331, and 42 U.S.C.A. 1983. The remedy was created by 28 U.S.C.A. 2201 and 2202, and the declaratory and injunctive relief sought requires the invocation of a Three-Judge Court as required by 28 U.S.C.A. 2281 and 2284.

(2) Venue is invoked upon the grounds that defendants are subject to service of process in the Central District of California, have been served with the complaint and summons and other documents in this district, have appeared and answered and not objected to the venue and waive any objection to venue.

III

The following facts are admitted and require no proof:

(a) Individual plaintiffs herein are citizens of the United States.

(b) Corporate plaintiffs herein are persons within the purview of 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343 and 28 U.S.C.A. 1331. [3]

(c) The licensee plaintiffs were and now are doing business within the State of California, and are holders of valid on-sale alcoholic beverage licenses issued by the defendants.

(d) The non-licensee plaintiffs were and now are employed as dancers within the State of California at on-sale alcoholic beverages premises of some of the licensee plaintiffs.

(e) The defendant DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL is a department and agency of the state government of the State of California, and was and is established by the Constitution of the State of California. The defendant EDWARD J. KIRBY is the Director of said Department.

(f) The defendants enacted Department Rules 143.2, 143.3, 143.4 and 143.5, which were filed with the Secretary of State of the State of California and became effective on August 10, 1970. The Rules apply statewide and have the effect of state law. Said Rules are promulgated as Sections 143.2, 143.3, 143.4, and 143.5 of Title 4 of the California Administrative Code.

(g) All of the licensee plaintiffs offer entertainment, including dancing on a stage before the patrons, on their licensed alcoholic beverages premises. The non-licensee plaintiffs perform dances on a stage before the patrons, at the licensed beverages premises. During the course of such dances, acts or conduct occur which fall within the proscribed acts and conduct set forth in Department Rule 143.3. [4]

(h) The MAC LEAN plaintiffs present at their licensed premises films, still pictures and visual

reproductions which depict, among other things, the prohibited acts enumerated in Rule 143.4.

(i) The MAC LEAN plaintiffs employ adult females on their licensed premises to sell and serve food and beverages, including alcoholic beverages, and while so employed, are bare breasted.

(j) All of the licensee plaintiffs' premises are open to the public.

(k) The defendants intend to and will take disciplinary action against the alcoholic beverages licenses of licensees violating Department Rules 143.2, 143.3, 143.4 and 143.5.

(l) Plaintiffs will suffer irreparable injury if their on-sale alcoholic beverages licenses are suspended or revoked.

(m) An actual controversy exists between the parties and the parties desire a declaration of their rights with respect to the constitutionality of the Department Rules in question.

#### IV

There are no reservations as to any facts recited herein.

#### V

The following facts, though not admitted, will not be contested at the trial by evidence to the contrary. The defendants will not refute the following factual allegations [5] as defendants contend that as to the Department Regulations involved in these proceedings such factual matters are immaterial and irrelevant. The facts are as follows:

(a) Books and magazines containing still pictures which depict acts or conduct falling within

the proscribed acts in Department Rule 143.4 are displayed and offered for sale at some off-sale alcoholic beverages premises within the State of California.

(b) Plaintiff licensees:

(i) Prohibit the attendance of minors, and cause the entrances of their premises to be policed to assure the nonentrance of minors; and

(ii) Present entertainment that cannot be viewed from outside the premises; and

(iii) Post conspicuous signs at the entrances which read as follows: "IF YOU WOULD BE OFFENDED BY NUDE ENTERTAINMENT DO NOT COME IN", and, "WARNING, THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED DO NOT ENTER"; and

(iv) Display signs and advertisements which convey only, normal description of the entertainment, e.g., "Nude Entertainment".

VI

No issues of fact remain to be litigated at the trial. There will be no oral testimony and all facts and exhibits shall be submitted to the Court in accordance with the pretrial Order. [6]

VII

Plaintiffs will offer at the trial, as their Exhibit "A", a copy of "THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY", together with the "SEPARATE STATEMENT OF CHARLES KEATING", as their only exhibit.

Defendant stipulates that no further foundation as to the authenticity need be offered, however, defendant objects to introduction thereof on the ground that it is immaterial to any issue in the case.

Defendants will offer as their Exhibit "A", the Reporter's Transcript of the proceedings held before the Department of Alcoholic Beverage Control on May 12th through the 14th, 1970, concerning Department of Alcoholic Beverage Control Rules 143.2, 143.3, 143.4 and 143.5.

Defendants will offer as their Exhibit "B", Sixty-eight (68) Exhibits introduced in connection with the proceedings on May 12th through the 14th, 1970.

### VIII

It is Ordered that the following amendments to the proceedings are allowed:

- (a) Attached Stipulation and Order and Amendment to Complaint of ROBERT La RUE, etc., et al., v. STATE OF CALIFORNIA; and
- (b) Attached Stipulation and Order and Amendment to Answer of defendants.

### IX

The parties agree that the trial of this action shall be based on the Pretrial Order and pleadings, except that the plaintiffs in ROBERT La RUE, etc., et al., v. STATE OF CALIFORNIA #70-1751-F abandon their claim for damages. [7]

### X

The following issue of law, and no others, remain to be litigated at the trial:

- (a) Are Alcoholic Beverage Control Rules Nos. 143.2, 143.3, 143.4 and 143.5, under the Twenty-

first Amendment of the United States Constitution and under the traditional state police powers over alcoholic beverages, unconstitutional on their face or as applied herein under the First, Fifth and Fourteenth Amendments of the United States Constitution?

## XI

The contentions of the parties are:

(a) Plaintiffs contend as follows:

(1) That the Rules on their face proscribe acts and conduct which comes within the freedom of speech guarantees of the First and Fourteenth Amendments.

(2) That the proscribed acts and conduct themselves come within the freedom of speech guarantees of the First and Fourteenth Amendments.

(3) The dancing presented by plaintiffs is protected by the First and Fourteenth Amendments.

(4) The visual displays presented by the plaintiffs are protected by the First and Fourteenth Amendments.

(5) The display of bare breasts by plaintiffs' waitresses is protected by the First and Fourteenth Amendments.

(6) The Department Rules impose a prior restraint or have a "chilling" effect on the presentation of entertainment [8] in violation of the First and Fourteenth Amendments.

(7) The Rules violate "due process" within the First and Fourteenth Amendments in that they are "overbroad".

(8) The Rules proscribe conduct which is constitutionally protected under STANLEY V. GEORGIA, 394 U. S. 557 (1969).

(9) The Rules violate "due process" within the First, Fifth and Fourteenth Amendments in that men of common intelligence must necessarily guess at what "simulated" sexual conduct, "mingle" and the other terms mean.

(10) The Rules deny plaintiffs equal protection of the law within the Fourteenth Amendment, in that they apply only to on-sale licensees.

(b) Defendants contend as follows:

1. *Freedom of speech - First and Fourteenth Amendments:*

1-A The non-verbal acts and conduct proscribed by the regulations are not themselves within the freedom of speech guarantee of the First and Fourteenth Amendments.

1-B The non-verbal acts and conduct proscribed by the regulations are not, and may not be, so inseparably intertwined-[9]ed with other non-proscribed activities enjoying freedom of speech protection so as to bring the proscribed acts and conduct within the freedom of speech guarantee of the First and Fourteenth Amendments.

1-B(a) The regulations proscribe specific acts and conduct. The regulations do not prohibit the employment of waitresses or the presenting of entertainment including dancing and motion pictures.

1-B(b) The sale and serving of alcoholic beverages is not within the freedom of speech

guarantee of the First and Fourteenth Amendments.

1-B(c) Entertainment, including dancing and motion pictures is not per se within the freedom of speech guarantee of the First and Fourteenth Amendments.

1-B(d). None of the proscribed acts and conduct are requisite elements in the function of a [10] waitress or in the presenting of entertainment, including dancing and motion pictures.

1-C Assuming, arguendo that the proscribed acts and conduct are within the freedom of speech guarantee of the First and Fourteenth Amendments, there is, nevertheless, a sufficiently important state interest in proscribing such non-verbal acts and conduct to justify the incidental restriction, if any, on the speech element or activity associated therewith.

1-C(a) A state has broad constitutional powers traditionally and under the Twenty-first Amendment to the United States Constitution, to prescribe and regulate the conditions under which alcoholic beverages may be sold, used and disposed of within its borders.

1-C(b) The regulations are in furtherance of important state interests in the regulation and control of the conditions surrounding the sale and consumption of alcoholic beverage on state licensed beverages premises. [11]

1-C(c) The regulations are not directed at the suppression of free speech.

1-C(d) The regulations are no greater in scope than what is essential to the furtherance of the state's interest.

1-C(e) *STANLEY V. GEORGIA* and other criminal obscenity statute cases are not applicable nor controlling as to these regulations. The regulations are not criminal obscenity statutes and apply only to state licensed public alcoholic beverages premises.

1-D The regulations do not place a "chilling effect" on freedom of speech and do not constitute a prior restraint on speech.

1-E If any part of a regulation is determined to be invalid under the free speech guarantee of the First and Fourteenth Amendments, the remaining provisions of the regulation should be declared valid. Each regulation was enacted with a severability provision.

2. *Due process - Fifth and Fourteenth Amendments.*

2-A The acts and conducts proscribed by the regulations are clearly specified and identified and are not vague or overbroad so as to constitute a denial [12] of due process in violation of the Fifth and Fourteenth Amendments.

2-B The state created "privilege" of selling alcoholic beverages is not a "right" or "property" of federal or state citizenship under the Fifth and Fourteenth Amendments.

2-C The due process clauses of the Fifth and Fourteenth Amendments are not controlling with respect to a state's alcoholic beverage con-

trol laws under the Twenty-first Amendment and the state's traditionally broad police powers over alcoholic beverages.

2-D *If* any part of a regulation is determined to be invalid under the due process clause of the Fifth and Fourteenth Amendments, the remaining provisions of the regulation should be declared valid. Each regulation was enacted with a severability provision.

3. *Equal Protection-Fourteenth Amendment.*

3-A Regulation 143.4 does not apply to books or magazines containing still pictures, hence there is no discrimination between on-sale and off-sale alcoholic beverages premises.

3-B That these particular regulations apply only to on-sale alcoholic beverages premises and not to off-sale alcoholic beverages premises is a proper classification and does [13] not violate the equal protection clause of the Fourteenth Amendment.

3-C The equal protection Clause of the Fourteenth Amendment is not controlling with respect to a state's alcoholic beverages control laws under the Twenty-first Amendment, and the state's traditionally broad police powers over alcoholic beverages.

3-D *If* any part of regulation 143.4 is determined to be invalid under the equal protection clause of the Fourteenth Amendment, the remaining provisions of the regulation should be declared valid. Regulation 143.4 was enacted with a severability provision.

The foregoing admissions have been submitted by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Order shall supplement the pleadings and govern the course of the trial of this case, unless modified to prevent manifest injustice.

Dated: this 29th day of October, 1970.

ILLEGIBLE  
JUDGE UNITED STATES  
DISTRICT COURT.

Approved as to form and content: Law Offices of Harrison W. Hertzberg, By /s/ ILLEGIBLE  
Attorneys for La Rue, etc., Warren J. Wolfe and Donald J. Boss, By /s/ ILLEGIBLE

Attorneys for Mac Lean, etc., [14] Law Offices of Berrien E. Moore, By /s/ Kenneth Scholtz, Attorneys for Jennings, etc., Thomas C. Lynch, Attorney General, by /s/ L. Stephen Porter, Attorneys for Defendants.

[15]

**Memorandum Opinion.**

In the United States District Court, Central District of California.

Robert LaRue, etc., et al., Plaintiffs v. State of California, et al., Defendants. Civil No. 70-1751-F.

Don MacLean, etc., et al., Plaintiffs v. The Department of Alcoholic Beverage Control, etc., Defendants. Civil No. 70-1770-F.

Jerry D. Jennings, etc., et al., Plaintiffs v. Edward J. Kirby, etc., et al., Defendants. Civil No. 70-1782-F.

Before: Hon. Walter Ely, Circuit Judge,

Hon. William P. Gray, District Judge, and

Hon. Warren J. Ferguson, District Judge.

FERGUSON, District Judge:

In 1967, the California Supreme Court, in an obscenity case, declared:

"The United States Supreme Court has wisely [1] recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote." *People v. Noroff*, 67 Cal. 2d 791, 796-97 (1967).

After that statement by California's highest court, it is somewhat surprising that a federal district court four years later is called upon to determine whether a state administrative agency may require "fig leaves" to be worn by entertainers in California.

These three actions are brought pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, and 42 U.S.C. § 1983, by various holders of California liquor licenses and dancers at licensed premises. A three-judge court was convened in accordance with 28 U.S.C. §§ 2281 and 2284. The actions seek to enjoin the enforcement of certain statewide rules adopted by the Department of Alcoholic Beverage Control and Edward J. Kirby, its director. The parties, by pre-trial stipulations and orders, have acknowledged proper jurisdiction and venue in this court.

#### *Rules in Issue*

The Department is established pursuant to Article 20, Section 22 of the California Constitution. That section provides in part: [2]

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

That paragraph of the state constitution has been interpreted to reject the contention of the Department that its power over denial, suspension and revocation of liquor licenses is limitless and absolute. It was held that the Department's power over such matters is subject to reasonable legislative enactment. *Kirby v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1200 (1969); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1215 (1969); *Big Boy Liquors, Ltd. v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1226 (1969).

The Department adopted Rules 143.2, 143.3, 143.4 and 143.5, effective August 10, 1970. The Rules, which are set forth in Appendix A, state generally that certain entertainment on premises licensed by the Department is contrary to public welfare and morals and no liquor license may be held at any establishment where such entertainment is permitted. In [3] summary they provide:

- (1) 143.2—prohibits topless waitresses.
- (2) 143.3—
  - (a) prohibits nude entertainers;
  - (b) regulates the content of entertainment;
  - (c) requires that certain entertainers perform on a stage.
- (3) 143.4—regulates the content of movies.
- (4) 143.5—prohibits any entertainment which violates a city or county ordinance.

The plaintiffs originally challenged all four Rules. However, at oral argument they withdrew their objections in these actions to the Rules which (1) prohibit topless waitresses, (2) permit local regulations, and (3)

require certain entertainers to be on a stage. The plaintiffs thus concede that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.

The court is, therefore, required to determine (1) whether Rule 143.4, which regulates the content of movies, is unconstitutional, and (2) whether those portions of Rule 143.3 which regulate the content of live entertainment are prohibited by the First, Fifth and Fourteenth Amendments.

#### *Doctrine of Abstention*

Prior to the determination of the merits of the litigation, it must be determined whether this court should stay its hand pending state court determination. In *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (Jan. 19, 1971), the Supreme Court invalidated a state law relating to liquor matters due to constitutional infirmities. Under ordinary circumstances, this court might have [4] adopted the reasoning of Mr. Justice Black in his dissenting opinion, when he stated: "I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries." 39 U.S.L.W. at 4131.

However, certain of the plaintiffs in this action have been to state court on many occasions to challenge the Rules, but the state courts have refused to assume jurisdiction over their complaints. The California Attorney General has requested the state courts to assume jurisdiction over the litigation presented here, but, reject-

ing that request, the state courts have refused. The Attorney General, furthermore, has asked that this court not abstain but decide the merits of the litigation.

It, therefore, appears that the doctrine of abstention should not be applied, and this court has the obligation to decide another state obscenity case before the state courts have ruled.<sup>1</sup> However, in order to place the litigation in proper focus, a discussion of the obscenity laws as propounded by the California Supreme Court, as well as the United States Supreme Court, is necessary.

#### *Background*

In 1965, a dancer in a California nightclub danced with her breasts exposed. The California Supreme Court, in *In re Giannini*, 69 Cal. 2d 563 (1968), held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The court stated:

"Nor can we accept the prosecution's sweeping argument that 'standards required of an obscenity prosecution are inapplicable in this case' because the 'conduct standing alone is clearly [5] unlawful' and does not become Lawful 'because it is engaged in during an activity' which would be

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<sup>1</sup>With all due respect to Judge Gray, his dissenting opinion warrants the reemphasis of two significant points. First, all parties involved agree that the California courts have refused to consider the significant constitutional questions which confront us. Second, all of the parties insist that this court *should* resolve these issues. The majority's respect for the California courts is no less than that entertained by Judge Gray, but when the California courts refuse to decide the issues, and when those issues are presented to us under orderly procedures authorized by law, we cannot abdicate our constitutional responsibility until some indefinite time which may never arrive.

afforded First and Fourteenth Amendment protections. Petitioner's apparent 'unlawful conduct' consisted of the baring of her breasts; the thrust of the argument presumably is that since such conduct could not be lawfully engaged in at any place and any time and under any and all circumstances it is not entitled to constitutional protection when performed in the different context of a theatrical performance.

"The conduct here of course took place during a theatrical performance of a dance before an audience. We have previously explained that such a dance enjoys constitutional protection. The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably a part of the dance, forfeits constitutional protection because of its alleged obscene nature.

"To isolate the questioned conduct and to judge it in an entirely different context would be to distort the nature of this case. By fictitiously changing the manner and place of its performance the prosecution would make the conduct criminal although in the actual manner and place of its performance the conduct should be tested by constitutional standards.

"Thus acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be [6] obscene. Respondent's contention would automatically reject the application of the law of obscenity to the instant case. It would adjudicate Iser's conduct as if it were not performed on the

stage, not a dance, and not incorporated in a form of communication. Yet the entire point of the case is that the conduct occurred in that very context."

Then, in 1968, Robert G. Barrows produced a one-act play in Hollywood, named "The Beard". The play ended with a simulated sex act, and the producer and actors were arrested for violating California Penal Code Sections involving disorderly conduct and obscenity. The California Supreme Court, in *Barrows v. Municipal Court*, 1 Cal. 3d 821 (1970), held that the disorderly conduct statute did not pertain to theatrical performers, and that the then existing California obscenity laws did not encompass live performances as distinguished from books, film and pictures. It was not until November of 1970 that the legislature enacted Section 311 (g) of the California Penal Code, which for the first time placed live entertainment within the ambit of the obscenity statutes.

It may be asserted that parts of the Rules are invalid because they do not conform to the obscenity statutes enacted by the California Legislature in light of the trilogy interpreting the relationship between the legislature and the Department (*Kirby, Samson Market Co. and Big Boy Liquors, Inc., supra*). However, that issue is one which does not involve the Federal Constitution and, therefore, is not before this court.

In the meantime, law enforcement agencies were upset with the decisions of the United States and California Supreme Courts in the field of obscenity. In May of 1970, the Department of Alcoholic Beverage Control began hearings on the Rules [7] which are

the subject of this litigation. Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. It is obvious, after reading the transcripts, that this is why the Department adopted the Rule which requires certain entertainers to perform on a stage at least six feet away from any customer. It is also obvious why the plaintiffs have abandoned their objection to that Rule. No reasonable person could claim that entertainers and customers have a constitutional right to engage in such conduct in a cocktail lounge.

However, a fair reading of the transcripts of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which would circumvent United States and California Supreme Court decisions relating to obscenity. Excerpts from the transcripts are contained in Appendix B. It must be stated initially, that displeasure by law enforcement agencies and state administrative agencies with court decisions interpreting the scope of the First Amendment cannot provide the basis for those agencies to adopt rules against entertainment which is protected by those decisions.

#### *The Issue of Obscenity Regarding Movies*

Rule 143.4 prohibits the showing of film, still pictures or other visual reproduction of certain portions of the body and conduct without regard to whether such visual portrayal is obscene.

One must be careful not to permit one's analysis of a theatrical performance to be clouded by his view of

the same conduct in a nontheatrical context. The state may certainly [8] regulate both, but the constitutional standards that must be applied to each are quite different. While both fall within the police power of the state, theatrical performances, as well as books, pictures and films, are within the protection of the First Amendment unless they are obscene.

In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court specifically held that motion pictures are within the free speech and free press guarantees of the First and Fourteenth Amendments. More recently, the Court of Appeals for the Ninth Circuit held, in *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), *aff'd sub nom. California v. Pinkus*, 39 U.S.L.W. 3223 (November 23, 1970), that a "stag" movie of a woman who disrobed and feigned some type of sexual satisfaction from self-induced acts is not obscene.

The State of California may, of course, prohibit obscene movies. That is not the issue here. The issue is whether or not the state may regulate the content of movies by prohibiting those which depict certain conduct, or exposure of portions of the body, without the requirement that the movies be factually and legally determined to be obscene under the standards required by the Supreme Court.

A summary of the obscenity laws is provided in *Roth v. United States*, 354 U.S. 476, 488-89 (1957):

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly suscep-

tible persons. *Regina v. Hicklin*, [1868] L. R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material [9] taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." (Footnotes omitted.)

In *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), the Court held:

"Under this definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

It is clear from these cases that isolated portions of a movie cannot be extracted out of the context of the whole. To do so has been uniformly condemned by the Supreme Court. Yet this is exactly what the Department's regulation does. Moreover, it fails to consider any possible redeeming social value of the material taken as a whole and in no way takes contemporary community standards into consideration.

In regard to the social value requirement, the Court, in *Stanley v. Georgia*, 394 U.S. 557, 566 (1969), stated:

"Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content.[10] The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all."

Assuming that under the California Constitution the Department has the power to prohibit the showing of obscene movies in licensed premises, it may not use a test which was specifically rejected 14 years ago by the Supreme Court.

#### *The Issue of Obscenity Regarding Live Entertainment*

Rule 143.3 regulates live entertainment and prohibits certain conduct and exposure. As stated previously, it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment, made applicable to the states through the Fourteenth Amendment. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959). In *In re Giannini*, 69 Cal. 2d 563, 567-68 (1968), the California Supreme Court stated:

"Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as an expression

of emotions or ideas. . . . The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus."

[11]

In that case, and *Barrows, supra*, the California Supreme Court held that dancing and live theatrical performances are within the First Amendment.

"[T]he performance of the dance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser's dancing, however vulgar and tawdry in content, might well involve communication to her audience." 69 Cal. 2d. at 570.

It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Smith v. California*, 361 U.S. 147 (1959). Nor does it lose its protection due to the fact that it is presented in an unusual manner. In *Schacht v. United States*, 398 U.S. 58 (1970), Justice Black stated that a performance is a theatrical one even though it is not performed in a conventional way in a conventional place. There, a mime troop performed outside an induction station, and the Supreme Court held that its members were acting in a theatrical production. The Court stated that "theatrical productions need not always be performed in buildings or even on

a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced." 398 U.S. at 81.

Nevertheless, the Department contends that live entertainment is not speech within the protection of the First Amendment, and relies on *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court affirmed a conviction for burning a draft card in spite of the assertion by the [12] defendant that his action was symbolic speech. However, *O'Brien* involved destruction of a selective service registration certificate. We are not dealing with violence or destruction when the subject is nothing more than the theatrical performance of dancing.

The Court, in *O'Brien*, set forth four individual tests which a regulation in this area must meet: (1) it must be within the constitutional power of the governmental agency; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

It seems clear that the regulations in question here do not meet the requirements of *O'Brien*. In light of the pre-trial stipulation, it is uncontested that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767 (1967), in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no "pandering" and the entertainment is presented in such a way that it is not forced upon unwilling individuals.

Moreover, the governmental interest which the Department seems to assert is directly related to the suppression of what may very well be non-obscene free expression. The resulting restriction on First Amendment freedoms is considerably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, limit its prohibition to obscene entertainment.

The Rule, as it pertains to dancing, runs afoul of the [13] *Roth* decision, as does the Rule pertaining to movies. While both may be prohibited if they are obscene, neither may be prohibited unless the constitutional test of obscenity is met. One isolated act may not be taken out of context from the whole, and to be considered obscene the whole must meet the three-pronged test set forth in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. Hopefully, the stage requirement set forth in Rule 143.3 will have the desired effect of prohibiting such conduct.

#### *Public Welfare and Morals*

It is evident from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers.

The Department claims the Rules further a substantial governmental interest, such as protection of the public welfare and morals from B-girls, prostitution, narcotics and the protection of minors. The Department asserts that those problems are increased when

alcohol and possible sexual stimulation are present within the same premises. Narcotic and prostitution violations may of course be prosecuted under criminal statutes, but certainly cannot be used as a vehicle to impose censorship without complying with the law on obscenity.

The pre-trial order stipulates that it is not disputed that the plaintiffs prohibit the attendance of minors in their establishments, and that they cause the premises and customers to be policed to insure the nonentrance of minors. The pre-trial order sets forth the further undisputed facts (1) that [14] the dancing cannot be viewed from outside the premises, (2) that persons are warned at the entrances of the type of entertainment that is conducted, and (3) that there is no pandering. It is, therefore, clear that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767, 769 (1967), are involved in the present action.

Theatrical entertainment may not be prohibited without a constitutional obscenity test because the state deems it necessary to protect the public welfare and morals. That decision was made by the Supreme Court in *Stanley v. Georgia, supra*:

“And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . .

"Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more importantly, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are [15] education and punishment for violations of the law . . . .' *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938 (1963)." 394 U.S. at 565-67. (Footnotes omitted.)

In *Carroll v. Princess Anne*, 393 U.S. 175 (1968), despite the fact that the case involved the threat of violence, the Court held that while sanctions against the plaintiffs may take the form of criminal prosecutions for the violation of valid laws, they may not take the form of prior censorship, absent a showing in an adversary proceeding of a clear and present danger.

Justice Mosk of the California Supreme Court, in *Burton v. Municipal Court*, 68 Cal. 2d 684, 696 (1968), succinctly answered the issue when he stated, "It is clear that where First Amendment rights are concerned the statute itself and not the evidence in an individual case establishes the boundaries of permissible conduct. . . ."

A state is not free to adopt whatever procedures it pleases for dealing with obscenity. *Marcus v. Search*

*Warrant*, 367 U.S. 717, 731 (1961). Dancing has always presented a problem to those who see it as representing perils of pagan memories. The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of *Roth*. Clearly the Rules as they pertain to entertainment do not meet that test and were, in fact, designed to circumvent it.

#### *The Twenty-First Amendment Argument*

Section 2 of the Twenty-First Amendment provides that:

"Sec. 2. The transportation or importation [16] into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), Mr. Justice Douglas held that in regard to liquor regulations the government has an unquestioned right to enact legislation to assure that the taxing power of the government over the liquor industry is effective. In *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (January 19, 1971), he stated that the police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment, citing *Crane v. Campbell*, 245 U.S. 304 (1917). Yet it was stated by all Justices, including those who dissented on the doctrine of abstention, that the interest of a state in regulating the liquor business cannot override the Due Process Clause of the Fourteenth Amendment. If it cannot override that clause, it certainly cannot override the First Amendment, which has

always received a "preferred position" among the liberties granted to all of us. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

All of the cases cited to the court by the Department interpreting the Twenty-First Amendment involved the interrelationship of that Amendment with the commerce clause and the import-export clause of the Constitution. It is clear that other clauses in the Constitution may not be used to restrict obscenity without complying with the standards established by the Supreme Court. See *Blount v. Rizzl*, 39 U.S.L.W. 4120 (January 14, 1971).

While it is true that one does not have an absolute right to receive a liquor license, it is equally true that the state cannot place an unconstitutional precondition on the [17] possession of these licenses. As the Supreme Court noted in *Sherbert v. Vernon*, 374 U.S. 398 (1963): "It is too late in the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing conditions upon a benefit or privilege." The fact that no direct restraint or punishment is imposed upon the exercise of speech does not determine the free speech question. Indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines or injunctions. *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950). Thus, a state agency cannot exercise its constitutional power to issue, renew or revoke liquor licenses for the purpose of censoring whatever it believes to be undesirable entertainment. To allow this would allow states to circumvent the protection provided by the First Amendment and do indirectly that which they cannot do directly.

*Obscenity Must be Determined by the Courts*

The Supreme Court, in explicit terms, has stated that the issue of obscenity must be determined by the courts and not merely by an administrative agency, no matter how well meaning it is.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court held that any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments: (a) any restraint prior to judicial determination must be imposed only briefly; (b) the censor must go to court in a specified brief period; and (c) the safeguards must be contained in the statute itself or be supplied by judicial rule.

In *Bount v. Rizzi, supra*, the Court strengthened the requirement that even in noncriminal cases only the courts have the constitutional authority to determine obscenity, and [18] that judicial review must be a swift one. There the Court cited *Freedman v. Maryland, supra*: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58.

The Rules adopted by the Department of Alcoholic Beverage Control are totally void of any requirement that the Department seek any judicial review of obscenity. The very limited judicial involvement is set forth in California Business and Professions Code §23090, which provides that:

"Any person affected by a final order of the [Alcoholic Beverage Control Appeals Board], . . .

may, . . . apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order."

In fact, as set forth previously, the Rules were designed to circumvent court decisions dealing with obscenity and to eliminate judicial determinations. That is constitutionally impermissible.

The procedure set forth by the Rules and the California Business and Professions Code requires the licensee to challenge the decision of the Department to suppress obscenity. This method was condemned in *Blount v. Rizzi, supra*, "the scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure . . . , or even any procedure assuring prompt judicial review". 39 U.S.L.Q. at 4122. Judicial review of the decisions of the Department is limited to appellate review (California Business and Professions Code §§ 23090-23090.7), which does not meet the standard required by *Freedman v. Maryland, supra*, and *Blount v. Rizzi, supra*. [19]

#### *Summary*

In summary, we hold that the Rules of the Department as written, which prohibit the content of movies and live entertainment, are void for the reason that they do not conform to the tests established by the United States Supreme Court. The other parts of the Rules, namely, those that regulate (a) the attire of waitresses; (b) the conduct between performers and customers; (c) the place where certain entertainers must perform; and (d) the adoption of local regulations provided they comport with the United States Constitution are not challenged.

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, a judgment shall be entered in each of the three cases in favor of the plaintiffs and against the defendants as follows:

"1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

"2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

"3. Each party shall bear its own costs. [20]

"4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes."

Dated this 6th day of April, 1971.

/s/ Walter Ely

Walter Ely

United States Circuit Judge

/s/ Warren J. Ferguson

Warren J. Ferguson

United States District Judge [21]

#### **APPENDIX A**

**"143.2 Attire and Conduct.** The following acts or conduct on licensed premises are deemed contrary to public welfare and morals and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

"(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

"(2) To employ or use the services of any hostess or other person to mingle with the patrons while such Hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

"(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

"(4) To permit any employee or person to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, [22] and to this end the provisions of this rule are severable.

"143.3. *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six-feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application [23] thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without

the invalid provision of application, and to this end the provisions of this rule are severable.

“143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

“The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

“(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

“(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

“(3) Scenes wherein a person displays the vulva or the anus or the genitals.

“(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

“If any provision of this rule or the application thereof to any person or circumstances is held invalid such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

“143.5. *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale [24] licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.” [25]

**APPENDIX B**

**I**

*Partial Testimony of Captain Robert Devin of the Los Angeles Police Department*

"CAPT. ROBERT A. DEVIN: Mr. Chairman, I'd like to introduce myself. I'm Capt. Robert Devin, commander of the administrative vice division of the Los Angeles Police Department. I have been a member of the police department in the City of Los Angeles for the past twenty-one and a half years. I have been assigned in my current assignment as the commander of the administrative vice division for the past one and a half years. Part of my responsibilities are the coordination, the review of the problem of pornography and obscenity throughout the City of Los Angeles. And in that capacity, I have formed some opinions. I believe I have documented the position that I am about to state to the group, and I'd like to share this information with the rules committee this morning.

"The Los Angeles Police Department supports all three of the rules changes that are proposed. We feel that there is a need for a measure of regulation in the field of live entertainment—rather, the field of nudity as pertains to live entertainment. Coincidentally, the City of Los Angeles is embarked at this time on a revised Cafe Entertainment Ordinance for the City of Los Angeles, that has been prompted primarily through recent court decision. The Barrows Case of January 30th, 1970, has compelled us to re-examine our cafe entertainment permit ordinance, and this is in the process of revision. As a matter of fact, it's going to be acted upon by our police commission tomorrow afternoon.

"The main position that we're taking as regards the subject of nudity in locations that are licensed by the Department [26] of Alcoholic Beverage Control, is that there is a compelling need for a separation of the entertainer from the non-entertainer. And this position is based on experience that we have had in the past one and a half years, during which time we've seen the advent and the growth of nude entertainment in our city bars.

"The former novelty of a topless female performer has now been replaced by the bottomless performer. Our first experience, our first knowledge that locations of this type were in existence in Los Angeles occurred approximately in February of 1969. In our opinion, this arose because of a California State Supreme Court decision that followed a prior federal rule, of the stated two important items. No. 1, it gave recognition to the dance as a form of expression, as a form of communication between the performer and the audience, stated, in effect, that the dance is constitutionally protected under the first amendment. And in the absence of a showing of obscenity, that a dance was constitutionally protected. And secondarily, it imposed, as part of the showing by the people, the necessity for a new contemporary community standard, and that standard would declare to be the standard of the State of California.

"While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography, and of obscenity and of behavior that is associated with this kind of performance." [27]

II

*Partial Testimony of Roy E. June, City Attorney of  
the City of Costa Mesa*

"MR. ROY E. JUNE: Good morning, gentlemen. My name is Roy E. June, and I am the City Attorney for the City of Costa Mesa, and I am here by direction of the City Council of the City of Costa Mesa to support the director in your promulgation of rules and regulations relating to topless and bottomless entertainment.

"The vigilant and reasonable attention to these establishments by the Costa Mesa Police Department has further served to place these activities in their proper perspective. The courts, however, have not been so generous. Section 647(a) of the Penal Code, lewd and dissolute conduct, is no longer available to the prosecution. We can use it under some circumstances, but not as extensively as we could in 1967.

"Portions of Section 615½ of the Penal Code, on indecent exposure, is not as available to the prosecution as it was in the year 1967. There have been inroads on these cases.

"Regulation of live entertainment, unless so broad to be cumbersome and unworkable, is no longer available to the prosecution. It remains, I think, for the Alcoholic Beverage Control Board to effectively regulate bottomless and topless dancers, and pornographic films displayed in these establishments."

III

*Partial Testimony of Richard C. Hirsch of the Office  
of the Los Angeles County District Attorney*

"In 1969, the Los Angeles County District Attorney's [28] office filed approximately 781 cases involving bottomless dancing. And almost all of these cases involved performances which were conducted on premises licensed by the Department of Alcoholic Beverage Control. They are almost all bar-type establishments. As of January 1st, 1970, there were approximately 134 convictions under Penal Code statutes. Now, we have to consider what a conviction means in terms of the criminal law. Most of the cases filed were either under Penal Code Section 647(a) as it then applied, or Section 314.1 of the Penal Code. These are the lewd and indecent exposure statutes. Most of the dances involved totally nude dancing or bottomless-type dancing. There were a few dances, some of which I personally prosecuted which involved topless-type dancing in which the dancer would wear a bikini-type bottom and then be exposed from the waist up without any sort of covering. To convict under the statutes under which these cases were filed, it had to be proven that the dance was obscene, and it had to be proven that such a dance was obscene beyond a reasonable doubt. As you no doubt know, the lewd conduct and indecent exposure statutes use words such as 'lewd,' 'lewdly,' 'dissolute,' but these words have been held to be synonymous with obscene. Therefore, to prove that that there was a violation of the criminal law, we had to prove that the three elements of obscenity were established, and prove that these elements were established beyond a reasonable doubt, each to a reasonable doubt, and beyond a moral certainty. The three ele-

ments of obscenity are, number one, that the dances were substantially beyond customary limits of candor in the community, and the Supreme Court of the United States held in the Giannini case that the community which was relevant was the entire State of California. Secondly, it had to be shown that [29] the predominant appeal to the dance was to the prurient interest, and that is a shameful or morbid interest in nudity, sex or excretion. And third, it had to be shown, and beyond a reasonable doubt, each of these standards, that the dances in question were utterly without redeeming social importance.

...

"Take an average case. Suppose we have a bottomless dance case and there is a citation issued on the dancer. And, say, the owner of the establishment who is present for aiding and abetting, that case would then be brought into the court. Generally what would happen, and this is the procedure we find in most of the defense in most of these cases, there may be a demur to the statute by the defense on the grounds that the statute on its face is unconstitutional. We have to send a deputy into court to prosecute that demurrer. Then, generally, the defense requests a pretrial hearing. And the pretrial hearing is, in effect, a separate trial. It's a full-blown trial in which ordinarily expert testimony is taken on the part of the defense and the prosecution to establish whether or not the material, the dance in question is constitutionally protected. At that time, the judge rules on whether or not it's constitutionally protected. If he rules it is not constitutionally protected, it has been the practice for the case to go up on a writ, prohibition or mandate at that time to the appellate department of the Superior Court. At that time, we

have an appellate deputy who would represent our office in the appellate department on that case. Then the case will more often than not come back to the trial court. At that time, we will engage in a full trial, either court or jury trial, which may last anywhere from a few days to a week or more. And, of course, this involves a deputy being tied up in the court for [30] this entire period of time. So, there is, on each case, the possibility of a great deal of time being expended by trial deputies in these proceedings.

"MR. SEXTON: Well, I was interested in the —or concerned about the public welfare in asking that, wondering how much it might cost the taxpayer to have to devote this amount of man-power to this type of entertainment.

"MR. HIRSCH: I don't have any specific totals for you, but I would assume that there are totals available as to what the cost of a jury trial is in a criminal case per day, and you can figure that out in the number of days that these cases would take. And I think it would be quite a considerable amount of money, plus the fact that expert witnesses must be generally paid. They are usually professional witnesses, psychiatrists in many parts, in many cases psychologists, individuals from the arts and theater who come in and expect to receive some sort of compensation for their time in court. These fees will vary in amount, but, of course, there is that expense also, in that they are first amendment cases that need that type of testimony." [31]

(Addendum to Judge Ferguson's opinion in *LaRue, et al. v. State of California* (Nos. 70-1751-F, 70-1770-F and 70-1782-F))

GRAY, District Judge, dissenting:

It seems to me that this is a case in which our court should abstain until the courts of California have had an opportunity to consider the constitutional issues here concerned. This conclusion is reinforced by the decisions of the Supreme Court in *Younger v. Harris*, 39 U.S.L.W. 4201 (February 23, 1971) and its five companion cases<sup>1</sup> that were all decided on the same day, and which came after *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (January 19, 1971), upon which the majority opinion here relies. It is true that *Younger* and its companion cases were concerned with whether a United States District Court should enjoin a currently pending state criminal prosecution, which is a somewhat different issue from the one here involved. However, a principal thrust of those opinions is to suggest to our three judge courts that we should give increased consideration to the concept of comity, which embodies ". . . a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is [32] sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious

<sup>1</sup>*Boyle v. Landry*, 39 U.S.L.W. 4207 (February 23, 1971); *Samuels v. Mackell*, 39 U.S.L.W. 4211 (February 23, 1971); *Perez v. Ledesma*, 39 U.S.L.W. 4214 (February 23, 1971); *Dyson v. Stein*, 39 U.S.L.W. 4231 (February 23, 1971); *Byrne v. Karalexis*, 39 U.S.L.W. 4236 (February 23, 1971).

though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 39 U.S.L.W. 4201, 4203 (February 23, 1971). This seems to me to be a good case in which to apply this principle.

The California courts are just as able as are we to consider whether or not the subject regulations square with the United States Constitution. They should be given the opportunity so to do, and I am by no means persuaded that this record shows them to have declined to assume such responsibility.

Now that this court has determined to rule on the merits of the case at hand, I find myself again in disagreement with the majority. The question here is not simply ". . . whether a state administrative agency may require 'fig leaves' to be worn by entertainers in California" (see majority opinion, page 2). I agree with Judge Ferguson that ". . . it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment . . ." (Majority opinion, page 11.) However, this valid assertion of the law does not necessarily carry the day in deciding this case.

Dancing without fig leaves may very well be a form of artistic expression protected by the First Amendment. But such a right is not absolute. For example, the state, under its police power, certainly could prohibit nude dancing on the street corner or on the campus of a junior high school. It is also within the police power to prohibit *all* sales of alcoholic beverages and to impose reasonable [33] restrictions upon the conditions under which such sales may be made.

If we acknowledge these things, I do not think that it is beyond the constitutional right of California, through its administrative agency, to say, in its wisdom or lack of wisdom, that lewd or naked dancing (even though not necessarily obscene) and the serving of alcohol do not properly mix, and that although a person may present one or the other, he may not do both at the same place and time.

As the majority opinion indicates, it is conceded that the regulations prohibiting direct personal contact between customers and naked employees are constitutionally enforceable. The opinion also suggests that this is so because such contact and what may result therefrom are offensive to public morals. At the administrative hearing from which the subject regulations stemmed, there was testimony as to some of the horrendous things that an occasional "well-oiled" patron purportedly did to the first girl that he saw, immediately upon leaving a bar after having been aroused and "inspired" by the nude dancing. We might think up logical reasons that would warrant regulations seeking to protect the public morals against on-site offenses, and ignore any subsequent danger. But I believe that nothing in the Constitution requires such a distinction.

DATED: April 2, 1971.

/s/ William P. Gray

**WILLIAM P. GRAY**

United States District Judge [34]

**Judgment.**

In the United States District Court, Central District of California.

Robert LaRue, etc., et al., Plaintiffs v. State of California, et al., Defendants. Civil No. 70-1751-F.

Don MacLean, etc., et al., Plaintiffs v. The Department of Alcoholic Beverage Control, etc., Defendants. Civil No. 70-1770-F.

Jerry D. Jennings, etc., et al., Plaintiffs v. Edward J. Kirby, etc., et al., Defendants. Civil No. 70-1782-F.

Filed: April 7, 1971.

This court having this date filed a memorandum opinion signed by the Honorable Walter Ely, United States Circuit Judge and the Honorable Warren J. Ferguson, United States District Judge, the Honorable William P. Gray, United States District Judge, dissenting, which memorandum opinion constitutes the findings of fact and conclusions of law of the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that a judgment is granted in each of these three cases in favor of [1] the plaintiffs and against the defendants as follows:

1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertain-

ment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

3. Each party shall bear its own costs.
4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes.

Dated this 6th day of April, 1971.

/s/ Walter Ely  
Walter Ely  
United States Circuit Judge

/s/ Warren J. Ferguson  
Warren J. Ferguson  
United States District Judge [2]

**FILE COPY**

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E. ROBERT SEAVIER, CLERK

**In the Supreme Court of the  
United States**

OCTOBER TERM, 1970

No. **71-36**

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, et al.,

*Appellants,*

vs.

ROBERT LARUE, et al.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**Jurisdictional Statement**

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# In the Supreme Court of the United States

October Term, 1970

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No.

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STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, et al.,

*Appellants,*

vs.

HONOR FALTUS, et al.,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

## Jurisdictional Statement

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Appellants State of California, Department of Alcoholic Beverage Control; Edward J. Kirby, Director of the California Department of Alcoholic Beverage Control; John J. Canny, Assistant Director of the California Department of Alcoholic Beverage Control; and John A. Kelly, James P. Meehan and Kermit Q. Greene, District Administrators of the California Department of Alcoholic Beverage Control, appeal from the Declaratory Judgment and Injunction

entered on April 7, 1971, by the specially constituted three-judge United States District Court for the Central District of California. This Statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

#### **OPINION BELOW**

The Opinion and Judgment of the United States District Court are not yet reported. Copies of the majority and dissenting opinions are attached hereto as Appendix A. A copy of the filed Judgment is attached hereto as Appendix B.

#### **JURISDICTION**

These suits were brought in the United States District Court for the Central District of California by appellees for declaratory and injunctive relief pursuant to Title 28, United States Code, sections 2201 and 2202, and Title 42, United States Code, section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28, United States Code, sections 1331 and 1343. Appellees sought a declaration that California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 were in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. Since appellees sought an injunction against the enforcement of California Department of Alcoholic Beverage Control regulations, regulations of statewide applicability, a three-judge court was convened pursuant to the authority and requirements of Title 28, United States Code, sections 2281 and 2284.

The District Court's Opinion and Judgment granting declaratory and injunctive relief was entered on April 7, 1971, and appellants' Notice of Appeal to this Court was filed in the United States District Court for the Central District of

California on May 5, 1971. A copy of the Notice of Appeal is attached hereto as Appendix C.

The jurisdiction of the Supreme Court of the United States on this direct appeal is conferred by Title 28, United States Code, section 1253.

### **STATUTES INVOLVED**

The statutes involved are California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, sections 143.2, 143.3, 143.4 and 143.5). The text of these regulations is set forth in Appendix D attached hereto.

### **QUESTIONS PRESENTED**

Does the First Amendment protect any and all *non-verbal* conduct (including acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation and flagellation) when the conduct is presented as purported "dancing" or "entertainment" and engaged in live or displayed by film on state licensed alcoholic beverages premises?

Where *non-verbal* conduct occurring on state licensed alcoholic beverages premises contains a communicative or "speech" element sufficient to bring into play the First Amendment, may a federal court require a State to restrict itself to *obscenity* as the only basis by which such conduct may be regulated or limited, or may a State proceed against such conduct regardless of whether or not the conduct is obscene, provided the State's enactments meet the criteria set down by this Court in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)?

May a federal court invalidate and enjoin the enforcement of otherwise valid State regulations by assuming that improper motives prompted such enactments?

**STATEMENT OF THE CASE**

With the advent of so-called "topless waitresses" on state licensed on-sale<sup>1</sup> alcoholic beverages premises, and the progression therefrom to nudes, to live sexual acts and conduct, and to visual displays (by motion pictures) of such sexual acts and conduct, the State of California has experienced an ever increasing progression of public welfare and morals problems in connection with the operation of on-sale alcoholic beverages premises where such non-verbal acts and conduct are employed and permitted.<sup>2</sup>

Initially, while the situation was still in the "topless" only stage, the appellant Department of Alcoholic Beverage Control attempted to prevent the attendant and resulting injuries to the public welfare and morals by notifying such licensees to refrain from such conduct and undertaking to discipline the alcoholic beverages licenses of those who would not desist. Resultant litigation finally reached the California Supreme Court in the case of *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal.3d 85, 465 P.2d 1 (1970).

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1. "On-sale" licenses in California authorize the sale and serving of alcoholic beverages to the public for consumption on the licensed premises (such as a bar), as contrasted to "off-sale" licenses authorizing sale of alcoholic beverages to the public for consumption off or away from the licensed premises (such as a package liquor store).

2. The record below (see Appendix E) establishes that when certain non-verbal acts and conduct are permitted on state licensed on-sale alcoholic beverages premises that attendant thereto, or resulting therefrom, are various injurious consequences to the public welfare and morals, including but not limited to: overt and unlawful sex acts between employees and between employees and the public; "B-girl" activity in the soliciting of drinks; prostitution; sale, possession and use of narcotics and dangerous drugs; sexual crimes including rapes, attempted rapes, and indecent exposures; other violent crimes including assaults on law enforcement officers; intemperance; exploitation of alcoholic beverages customers; and serious and extensive law enforcement problems due to the increase in criminal offenses in and around such premises.

Specifically pointing out that the hearing record before it contained only the sterile stipulation between the parties that bare-breasted waitresses were employed on the licensee's premises, the California Supreme Court held that there was no evidence in the record by which it could conclude that the evils the Department sought to prevent were related to the use of topless waitresses and, therefore, that the Department's disciplining of the license could not be sustained. The California Supreme Court then set forth:

"Finally, although it appears unnecessary, we point out that our conclusions have been reached on the record before us. We are not unaware of the public concern for proper regulation of premises licensed to sell alcoholic beverages. Our holding confers on them neither a general sanction to employ topless or similarly undressed waitresses nor a general immunity from the Department's disciplinary action in the event they do. If such purveying of liquor is in fact attended by the deleterious consequences which the Department claims, it should have no difficulty, in appropriate disciplinary proceedings, in proving them. In a word it should establish 'good cause' and make out its case. *Alternatively, the Department could draw upon its expertise and the empirical data available to it and adopt regulations covering the situation.*" (465 P.2d at 16, emphasis added)

Following the *Boreta* decision, and the intervening intensification of problems resulting from the steady progression of sexual acts and conduct on licensed alcoholic beverages premises, the Department—seeking to prevent the "deleterious consequences" from occurring, rather than merely disciplining licenses after such damage to the public welfare and morals had already occurred—proceeded in its quasi-legislative capacity<sup>3</sup> to hold legislative hearings and to se-

3. The California Department of Alcoholic Beverage Control is a "constitutional agency" of California state government and is vested with self-executing powers by constitutional grant. (California Constitution, Article XX, Section 22).

cure expert opinions and the available empirical data whereby it could formulate and enact proper regulations for state licensed alcoholic beverages premises.

After the compilation of 703 pages of legislative hearing transcript and the receipt of over 67 exhibits, the Department duly enacted Department Regulations 143.2 through 143.5 (Appendix D).

Thereafter, the appellees, who are corporate and individual on-sale alcoholic beverages licensees (plus a few employees in *LaRue et al*), filed declaratory and injunctive relief actions in both the California state courts and in the United States District Court for the Central District of California. The actions basically sought to have the newly enacted regulations declared unconstitutional as in violation of the freedom of speech and due process guarantees of the First, Fifth and Fourteenth Amendments, and their enforcement by the appellant Department of Alcoholic Beverage Control and its officers enjoined. The California state courts (including the California Supreme Court and the California Court of Appeal) refused to stay the enforcement of the regulations and declined to hear the declaratory and injunctive relief actions. The federal District Court then proceeded with the actions before a specially constituted three-judge Court.

On April 7, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Opinion and Judgment (Appendix A & B) holding in substance that the acts and conduct proscribed by Department Regulations 143.3 and 143.4 are within the freedom of speech guarantees of the First and Fourteenth Amendments, that such acts and conduct could be proscribed by the State only upon proper proof of their *obscenity*, that the regulations were prompted by improper motives to circumvent *obscenity* proof require-

ments, and that the said regulations were therefore invalid as in violation of the First, Fifth and Fourteenth Amendments. It is from that portion of the Judgment invalidating Department Regulation 143.3 in part and Department Regulation 143.4 in toto, and enjoining the enforcement thereof, which appellants appeal (Appendix C).

### **THE QUESTIONS ARE SUBSTANTIAL**

Against the backdrop of the First and Twenty-first Amendments, and a State's traditionally broad police powers over the conditions surrounding the sale and serving of alcoholic beverages within a State's borders, the questions presented by these appeals involve the State of California's attempt to regulate and control certain conditions surrounding the sale and serving of alcoholic beverages on state-licensed alcoholic beverages premises, which conditions are attended by, and result in, serious and grave injuries to the public welfare and morals of the people of California.

Regulation and control over the conditions surrounding the sale and service of alcoholic beverages in California is statutorily declared by the California Legislature to involve "an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State," and "involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people."<sup>4</sup>

The importance of alcoholic beverage control in California is further evidenced by the people's direct establishment of the California Department of Alcoholic Beverage Control in the California Constitution and the self-executing, direct constitutional grant of power from the people of California to the Department of Alcoholic Beverage Control

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4. Section 23001, Calif. Alcoholic Beverage Control Act, Div. 9, Calif. Bus. & Prof. Code.

to suspend or revoke alcoholic beverages licenses upon the Department's determination that continuance of the licenses would be contrary to the public welfare or morals.<sup>5</sup>

On the basis of: California statutory law, officially reported decisions dealing with conditions resulting on alcoholic beverages premises when certain types of acts or conduct were permitted, several days of legislative hearings, and the gathering and review of expert opinions and available empirical data, the California Department of Alcoholic Beverage Control enacted Department Regulations 143.2 through 143.5 (Appendix D).

The majority of the District Court found Department Regulations 143.3 and 143.4 to be invalid. The District Court has done so on the basis that the non-verbal conduct proscribed by the regulations constitutes "speech" or "expression", is protected by the First Amendment, and may not be regulated by the State unless the State proves such conduct to be *obscene*. Furthermore, the majority of the District Court conclude that an improper *motive* to circumvent *obscenity* proof requirements prompted the enactments.

The error in the majority's reasoning is threefold. First, the majority assumes that all non-verbal conduct presented as purported "dancing" or "entertainment", either live or by way of film, is "speech" or "expression" and protected by the First Amendment. Secondly, the majority assumes that as to conduct falling within the protection of the First Amendment, such conduct may be regulated or limited by the State *only* upon proof that such conduct is *obscene*. Lastly, the majority assumes that enactment of the regulations was improperly motivated by a desire to circumvent the standards of proof required to establish *obscenity*.

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5. California Constitution, Article XX, Section 22. The constitutional grant of power to the Department is further augmented by an identical statutory grant of power to the Department from the California Legislature. California Alcoholic Beverage Control Act, Sections 24200(a) and 25750 (Div. 9, Calif. Bus. & Prof. Code)

I. **Live Acts or Visual Displays in Public of Sexual Intercourse, Masturbation, Sodomy, Bestiality, Oral Copulation and Flagellation; Public Display of Genitalia and Anuses; and Other Such Non-Verbal Acts and Conduct, Do Not Constitute "Speech" and Are Not Within the Protection of the First and Fourteenth Amendments.**

The California Department of Alcoholic Beverage Control regulations which were invalidated and enjoined by the District Court prescribe that an on-sale alcoholic beverages license may not be held at any premises where certain *non-verbal* acts or conduct are permitted, including: (1) acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation and any sexual acts prohibited by state law, (2) display of genitalia and anuses, (3) touching, caressing and fondling of breasts, buttocks, anus or genitalia, and (4) visual displays (films or slides) of the foregoing acts and conduct.

Such *non-verbal* acts and conduct do not constitute "speech" and are not entitled to the protection afforded speech by the First and Fourteenth Amendments.

While First Amendment protection has been expanded from verbal and printed speech to encompass certain non-verbal "symbolic speech" (non-verbal acts or conduct engaged in with the intent of expressing an idea or protest), this Honorable Court has recently held that even where the intent to express an idea or protest exists, this does not automatically give such "symbolic speech" First Amendment protection. As set forth by this Court in *United States v. O'Brien*, 368 U.S. 367, 376 (1968):

"O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First

Amendment guarantees includes all modes of 'communicaton of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'

*We cannot accept the view that an apparently endless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."* (emphasis added)

And see also Mr. Chief Justice Warren's dissenting opinion, and the dissenting opinions of Mr. Justices Black, White and Fortas in *Street v. New York*, 394 U.S. 576, 594-617 (1969), a flag burning protest case in which the majority of this Court reversed the conviction on the basis that it was impossible to tell from the record if the conviction was solely for the non-verbal act of flag burning or included the words spoken by the defendant at the time he burned the flag.

Without attempting to speculate as to what, *if any*, idea or protest the person exposing his or her genitalia or anus, or the persons engaging in acts of sodomy, oral copulation, masturbation, bestiality or flagellation, are attempting to express to the public, appellants submit that such *non-verbal* acts and conduct do not have a recognized "symbolic speech" element entitling them to First Amendment protection. *Cox v. Louisiana*, 379 U.S. 559, 562-564 (1965); *Cowgill v. California*, 396 U.S. 371, 371-372 (1970); and see *Derrington v. City of Portland*, (Ore.), 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

The District Court's decision seriously errs in holding that the *non-verbal* acts and conduct proscribed by the State regulations are within the protection of the First and Fourteenth Amendments.

II. Assuming That the Non-Verbal Acts and Conduct Involved in the Instant State Regulations Initially Have First Amendment Protection, a Federal Court May Not Require a State to Restrict Itself to Obscenity as the Only Basis for Regulation of such Non-Verbal Conduct. A State May Regulate and Limit First Amendment Activity on Non-Obscenity Grounds so Long as the State's Regulations Meet the Criteria Set Down by This Court in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

Even if the non-verbal acts and conduct involved in the instant regulations have a "speech" or "expression" element entitling them initially to First and Fourteenth Amendment protection, or even if they are found to be inseparably woven into other non-proscribed activities having First and Fourteenth Amendment protection, the regulations are nonetheless valid as they embody important state interests which clearly outweigh any incidental limitation on such non-verbal, commercial conduct.

The District Court majority has taken the position that such non-verbal acts and conduct may be regulated by the State *only* if they are *obscene*, and that the regulations are therefore invalid because they do not concern themselves with *obscenity* and do not require the standards of proof as to *obscenity*. (Appendix A)

Such a posture by the District Court is clearly erroneous. *Obscenity* is not the only basis upon which a State may regulate or limit First Amendment activity. *Hughes v. Superior Court of California*, 339 U.S. 460 (1950) and *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950) (picketing); *Beauharnis v. Illinois*, 343 U.S. 250 (1952) (libel); *United States v. Harris*, 347 U.S. 612 (1954) (lobbying); *Breard v. Alexandria*, 341 U.S. 622 (1951) (door-to-door soliciting); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning); and see *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966), and *Purity Extract Co. v. Lynch*, 226 U.S. 192, 201 (1912).

The District Court majority relies on *Roth v. United States*, 354 U.S. 476 (1957), and its progeny. But *Roth* was a criminal *obscenity* case which established that *obscenity* is not afforded First Amendment protection. *Roth* and the subsequent decisions of this Court relating thereto, have dealt with what standards of proof are to be used in determining or establishing *obscenity*. The instant State regulations however do not deal with *obscenity*. In the instant regulations, the State is not attempting to proscribe the acts and conduct because they are *obscene* and therefore contrary to the public welfare and morals, but because of other important and substantial state interests which are injured when such acts and conduct are permitted on premises wherein the public are consuming alcoholic beverages.

This Court clearly set forth in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968) that:

"... This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The State regulations invalidated and enjoined by the District Court clearly meet all of the *O'Brien* criteria.

Both traditionally and under the Twenty-first Amendment, a state has broad power to regulate and control the conditions surrounding the sale, use, distribution and consumption of alcoholic beverages within its borders. *United States Constitution, Twenty-first Amendment; Seagram v. Hostetter*, 384 U.S. 35, 41-43 (1966) *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964); *California v. Washington*, 358 U.S. 64 (1958); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); *Crowley v. Christensen*, 137 U.S. 86, 91 (1890). This Court has recently refused to review California alcoholic beverage control disciplinary cases where the alcoholic beverages licenses have attempted to raise First Amendment contentions in connection with *non-verbal* sexual conduct or displays on state licensed alcoholic beverages premises. *Meacham dba "Barbary Coast" v. California Department of Alcoholic Beverage Control*, 393 U.S. 855 (1968); *Probro, Inc. v. Department of Alcoholic Beverage Control of California*, 392 U.S. 855 (1968); *Keller v. California Department of Alcoholic Beverage Control*, 400 U.S. 806 (1970); and see *Derrington v. City of Portland*, (Ore.) 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

The instant regulations further important and substantial state interests in preventing a state alcoholic beverages licensee from permitting certain non-verbal acts and conduct on state licensed alcoholic beverages premises when such acts and conduct in conjunction with patrons consuming alcoholic beverages is attended by, and results in, injurious acts to public welfare and morals. As the record before the Department at the time it enacted the regulations, and which is presently on file with the District Court, contains 703 pages of legislative hearing transcript and over 67 lengthy exhibits, appellants did not request its certification to this Court at this time. Attached hereto as Appendix E

is a limited summary of the some of the public welfare and morals factors shown by the record.

The State's interests are unrelated to the suppression of free expression and the regulations are no greater than essential to the furtherance of the State's interests. The regulations proscribe certain non-verbal acts and conduct on licensed on-sale alcoholic beverages premises. The regulations do not suppress speech, dancing, motion pictures or other forms of entertainment.

### **III. A Federal Court May Not Invalidate and Enjoin Otherwise Valid State Regulations by Assuming That Improper Motives Prompted Such Enactments.**

Selecting limited excerpts from various statements in the legislative hearing record, the majority of the District Court *assume* that the motive behind the enactment of the regulations was not to deter the consequences set forth by the Department but rather to circumvent *obscenity* proof requirements. (Appendix A)

Reliance on such a basis for invalidation of State regulations is contra to the well established rule that the courts may not defeat otherwise valid enactments by assuming that improper motives prompted such enactments. *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Palmer v. Thompson*, ..... U.S. ...., 39 L.W. 4759, 4761 (Oct. Term 1970, June 14, 1970); *Barenblatt v. United States*, 360 U.S. 109, 132 (1959).

### **CONCLUSION**

The District Court majority decision erroneously expands First and Fourteenth Amendment protection to certain non-verbal sexual acts and conduct on the basis that they purportedly are "dancing" or "entertainment" and therefore within the sphere of the First Amendment.

The District Court majority decision misapprehends

prior First Amendment decisions of this Honorable Court dealing with *obscenity*, with the result that the District Court's decision would limit and restrict a state's possible regulatory power over First Amendment activities to *only* that conduct which is *obscene*. Such a decision is clearly contra to *United States v. O'Brien* and the other First Amendment decisions of this Court cited herein.

It is submitted that the District Court majority has erred, that the questions presented by this appeal are substantial, that they are of great nationwide, public importance, and that they deal with extremely important California state policy within the area of state alcoholic beverage control. It is urged that probable jurisdiction be noted.

Dated: June 30, 1971

Respectfully submitted,

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**(Appendices Follow)**

## **Appendix A**

*In the United States District Court  
Central District of California*

Filed—April 7, 1971

**ROBERT LARUE, etc., et al.**

*Plaintiffs*

v.

Civil No.  
70-1751-F

**STATE OF CALIFORNIA, et al.,**

*Defendants*

**DON MACLEAN, etc., et al.,**

*Plaintiffs*

v.

Civil No.  
70-1770-F

**THE DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, etc.,**

*Defendants*

**JERRY D. JENNINGS, etc.,  
et al.,**

*Plaintiffs*

v.

Civil No.  
70-1782-F

**EDWARD J. KIRBY, etc., et al.,**

*Defendants*

## **MEMORANDUM OPINION**

Before: Hon. Walter Ely, Circuit Judge,  
Hon. William P. Gray, District Judge, and  
Hon. Warren J. Ferguson, District Judge.

FERGUSON, District Judge:

In 1967, the California Supreme Court, in an obscenity case, declared:

"The United States Supreme Court has wisely recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense

*Appendix*

discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote." *People v. Noroff*, 67 Cal. 2d 791, 796-97 (1967).

After that statement by California's highest court, it is somewhat surprising that a federal district court four years later is called upon to determine whether a state administrative agency may require "fig leaves" to be worn by entertainers in California.

These three actions are brought pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, and 42 U.S.C. § 1983, by various holders of California liquor licenses and dancers at licensed premises. A three-judge court was convened in accordance with 28 U.S.C. §§ 2281 and 2284. The actions seek to enjoin the enforcement of certain statewide rules adopted by the Department of Alcoholic Beverage Control and Edward J. Kirby, its director. The parties, by pre-trial stipulations and orders, have acknowledged proper jurisdiction and venue in this court.

*Rules in Issue*

The Department is established pursuant to Article 20, Section 22 of the California Constitution. That section provides in part:

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the

granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

That paragraph of the state constitution has been interpreted to reject the contention of the Department that its power over denial, suspension and revocation of liquor licenses is limitless and absolute. It was held that the Department's power over such matters is subject to reasonable legislative enactment. *Kirby v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1200 (1969); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1215 (1969); *Big Boy Liquors, Ltd. v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1226 (1969).

The Department adopted Rules 143.2, 143.3, 143.4 and 143.5, effective August 10, 1970. The Rules, which are set forth in Appendix A, state generally that certain entertainment on premises licensed by the Department is contrary to public welfare and morals and no liquor license may be held at any establishment where such entertainment is permitted. In summary, they provide:

- (1) 143.2 — prohibits topless waitresses.
- (2) 143.3 —
  - (a) prohibits nude entertainers;
  - (b) regulates the content of entertainment;
  - (c) requires that certain entertainers perform on a stage.
- (3) 143.4 — regulates the content of movies.
- (4) 143.5 — prohibits any entertainment which violates a city or county ordinance.

The plaintiffs originally challenged all four Rules. However, at oral argument they withdrew their objections in these actions to the Rules which (1) prohibit topless waitresses, (2) permit local regulations, and (3) require certain entertainers to be on a stage. The plaintiffs thus concede

that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.

The court is, therefore, required to determine (1) whether Rule 143.4, which regulates the content of movies, is unconstitutional, and (2) whether those portions of Rule 143.3 which regulate the content of live entertainment are prohibited by the First, Fifth and Fourteenth Amendments.

#### *Doctrine of Abstention*

Prior to the determination of the merits of the litigation, it must be determined whether this court should stay its hand pending state court determination. In *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (Jan. 19, 1971), the Supreme Court invalidated a state law relating to liquor matters due to constitutional infirmities. Under ordinary circumstances, this court might have adopted the reasoning of Mr. Justice Black in his dissenting opinion, when he stated: "I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries." 39 U.S.L.W. at 4131.

However, certain of the plaintiffs in this action have been to state court on many occasions to challenge the Rules, but the state courts have refused to assume jurisdiction over their complaints. The California Attorney General has requested the state courts to assume jurisdiction over the litigation presented here, but, rejecting that request, the state courts have refused. The Attorney General, furthermore, has asked that this court not abstain but decide the merits of the litigation.

It, therefore, appears that the doctrine of abstention should not be applied, and this court has the obligation to decide another state obscenity case before the state courts have ruled.<sup>1</sup> However, in order to place the litigation in proper focus, a discussion of the obscenity laws as pronounced by the California Supreme Court, as well as the United States Supreme Court, is necessary.

#### *Background*

In 1965, a dancer in a California nightclub danced with her breasts exposed. The California Supreme Court, in *In re Giannini*, 69 Cal. 2d 563 (1968), held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The court stated:

"Nor can we accept the prosecution's sweeping argument that 'standards required of an obscenity prosecution are inapplicable in this case' because the 'conduct standing alone is clearly unlawful' and does not become lawful 'because it is engaged in during an activity' which would be afforded First and Fourteenth Amendment protections. Petitioner's apparent 'unlawful conduct' consisted of the baring of her breasts; the thrust of the argument presumably is that since such conduct could not be lawfully engaged in at any place and any time and under any and all circumstances it is not entitled to constitutional protection when performed in the different context of a theatrical performance.

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1. With all due respect to Judge Gray, his dissenting opinion warrants the reemphasis of two significant points. First, all parties involved agree that the California courts have refused to consider the significant constitutional questions which confront us. Second, all of the parties insist that this court *should* resolve these issues. The majority's respect for the California courts is no less than that entertained by Judge Gray, but when the California courts refuse to decide the issues, and when those issues are presented to us under orderly procedures authorized by law, we cannot abdicate our constitutional responsibility until some indefinite time which may never arrive.

### Appendix

"The conduct here of course took place during a theatrical performance of a dance before an audience. We have previously explained that such a dance enjoys constitutional protection. The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably a part of the dance, forfeits constitutional protection because of its alleged obscene nature.

"To isolate the questioned conduct and to judge it in an entirely different context would be to distort the nature of this case. By fictitiously changing the manner and place of its performance the prosecution would make the conduct criminal although in the actual manner and place of its performance the conduct should be tested by constitutional standards.

"Thus acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene. Respondent's contention would automatically reject the application of the law of obscenity to the instant case. It would adjudicate Iser's conduct as if it were not performed on the stage, not a dance, and not incorporated in a form of communication. Yet the entire point of the case is that the conduct occurred in that very context."

Then, in 1968, Robert G. Barrows produced a one-act play in Hollywood, named "The Beard". The play ended with a simulated sex act, and the producer and actors were arrested for violating California Penal Code Sections involving disorderly conduct and obscenity. The California Supreme Court, in *Barrows v. Municipal Court*, 1 Cal. 3d 821 (1970), held that the disorderly conduct statute did not pertain to theatrical performers, and that the then existing California obscenity laws did not encompass live perform-

ances as distinguished from books, film and pictures. It was not until November of 1970 that the legislature enacted Section 311(g) of the California Penal Code, which for the first time placed live entertainment within the ambit of the obscenity statutes.

It may be asserted that parts of the Rules are invalid because they do not conform to the obscenity statutes enacted by the California Legislature in light of the trilogy interpreting the relationship between the legislature and the Department (*Kirby, Samson Market Co. and Big Boy Liquors, Inc., supra*). However, that issue is one which does not involve the Federal Constitution and, therefore, is not before this court.

In the meantime, law enforcement agencies were upset with the decisions of the United States and California Supreme Courts in the field of obscenity. In May of 1970, the Department of Alcoholic Beverage Control began hearings on the Rules which are the subject of this litigation. Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. It is obvious, after reading the transcripts, that this is why the Department adopted the Rule which requires certain entertainers to perform on a stage at least six feet away from any customer. It is also obvious why the plaintiffs have abandoned their objection to that Rule. No reasonable person could claim that entertainers and customers have a constitutional right to engage in such conduct in a cocktail lounge.

However, a fair reading of the transcripts of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which

would circumvent United States and California Supreme Court decisions relating to obscenity. Excerpts from the transcripts are contained in Appendix B. It must be stated initially, that displeasure by law enforcement agencies and state administrative agencies with court decisions interpreting the scope of the First Amendment cannot provide the basis for those agencies to adopt rules against entertainment which is protected by those decisions.

### *The Issue of Obscenity Regarding Movies*

Rule 143.4 prohibits the showing of film, still pictures or other visual reproduction of certain portions of the body and conduct without regard to whether such visual portrayal is obscene.

One must be careful not to permit one's analysis of a theatrical performance to be clouded by his view of the same conduct in a nontheatrical context. The state may certainly regulate both, but the constitutional standards that must be applied to each are quite different. While both fall within the police power of the state, theatrical performances, as well as books, pictures and films, are within the protection of the First Amendment unless they are obscene.

In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court specifically held that motion pictures are within the free speech and free press guaranties of the First and Fourteenth Amendments. More recently, the Court of Appeals for the Ninth Circuit held, in *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), *aff'd sub nom. California v. Pinkus*, 39 U.S.L.W. 3223 (November 23, 1970), that a "stag" movie of a woman who disrobed and feigned some type of sexual satisfaction from self-induced acts is not obscene.

The State of California may, of course, prohibit obscene movies. That is not the issue here. The issue is whether or

not the state may regulate the content of movies by prohibiting those which depict certain conduct, or exposure of portions of the body, without the requirement that the movies be factually and legally determined to be obscene under the standards required by the Supreme Court.

A summary of the obscenity laws is provided in *Roth v. United States*, 354 U.S. 476, 488-89 (1957) :

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, [1868] L. R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." (Footnotes omitted.)

In *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), the Court held:

"Under this definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

It is clear from these cases that isolated portions of a movie cannot be extracted out of the context of the whole.

To do so has been uniformly condemned by the Supreme Court. Yet this is exactly what the Department's regulation does. Moreover, it fails to consider any possible redeeming social value of the material taken as a whole and in no way takes contemporary community standards into consideration.

In regard to the social value requirements, the Court, in *Stanley v. Georgia*, 394 U.S. 557, 566 (1969), stated:

"Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all."

Assuming that under the California Constitution the Department has the power to prohibit the showing of obscene movies in licensed premises, it may not use a test which was specifically rejected 14 years ago by the Supreme Court.

#### *The Issue of Obscenity Regarding Live Entertainment*

Rule 143.3 regulates live entertainment and prohibits certain conduct and exposure. As stated previously, it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment, made applicable to the states through the Fourteenth Amendment. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959). In *In re Giannini*, 69 Cal. 2d 563, 567-68 (1968), the California Supreme Court stated:

"Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as

an expression of emotions or ideas. . . . The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus."

In that case, *and Barrows, supra*, the California Supreme Court held that dancing and live theatrical performances are within the First Amendment.

"[T]he performance of the dance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser's dancing, however vulgar and tawdry in content, might well involve communication to her audience."

69 Cal. 2d at 570.

It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Smith v. California*, 361 U.S. 147 (1959). Nor does it lose its protection due to the fact that it is presented in an unusual manner. In *Schacht v. United States*, 398 U.S. 58 (1970), Justice Black stated that a performance is a theatrical one even though it is not performed in a conventional way in a conventional place. There, a mime troop performed outside an induction station, and the Supreme Court held that its members were acting in a theatrical production. The Court stated that "theatrical productions need not always be performed in buildings or even on a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced." 398 U.S. at 61.

Nevertheless, the Department contends that live entertainment is not speech within the protection of the First Amendment, and relies on *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court affirmed a conviction for burning a draft card in spite of the assertion by the defendant that his action was symbolic speech. However, *O'Brien* involved destruction of a selective service registration certificate. We are not dealing with violence or destruction when the subject is nothing more than the theatrical performance of dancing.

The Court, in *O'Brien*, set forth four individual tests which a regulation in this area must meet: (1) it must be within the constitutional power of the governmental agency; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

It seems clear that the regulations in question here do not meet the requirements of *O'Brien*. In light of the pre-trial stipulation, it is uncontested that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767 (1967), in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no "pandering" and the entertainment is presented in such a way that it is not forced upon unwilling individuals.

Moreover, the governmental interest which the Department seems to assert is directly related to the suppression of what may very well be non-obscene free expression. The resulting restriction on First Amendment freedoms is con-

siderably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, limit its prohibition to obscene entertainment.

The Rule, as it pertains to dancing, runs afoul of the *Roth* decision, as does the Rule pertaining to movies. While both may be prohibited if they are obscene, neither may be prohibited unless the constitutional test of obscenity is met. One isolated act may not be taken out of context from the whole, and to be considered obscene the whole must meet the three-pronged test set forth in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. Hopefully, the stage requirement set forth in Rule 143.3 will have the desired effect of prohibiting such conduct.

#### *Public Welfare and Morals*

It is evident from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers.

The Department claims the Rules further a substantial governmental interest, such as protection of the public welfare and morals from B-girls, prostitution, narcotics and the protection of minors. The Department asserts that those problems are increased when alcohol and possible sexual stimulation are present within the same premises. Narcotic and prostitution violations may of course be prosecuted under criminal statutes, but certainly cannot be used as a vehicle to impose censorship without complying with the law on obscenity.

The pre-trial order stipulates that it is not disputed that the plaintiffs prohibit the attendance of minors in their establishments, and that they cause the premises and customers to be policed to insure the nonentrance of minors. The pre-trial order sets forth the further undisputed facts (1) that the dancing cannot be viewed from outside the premises, (2) that persons are warned at the entrances of the type of entertainment that is conducted, and (3) that there is no pandering. It is, therefore, clear that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767, 769 (1967), are involved in the present action.

Theatrical entertainment may not be prohibited without a constitutional obscenity test because the state deems it necessary to protect the public welfare and morals. That decision was made by the Supreme Court in *Stanley v. Georgia, supra*:

"And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . .

"Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more importantly, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents

ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . . *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938 (1963)." 394 U.S. at 565-67. (Footnotes omitted.)

In *Carroll v. Princess Anne*, 393 U.S. 175 (1968), despite the fact that the case involved the threat of violence, the Court held that while sanctions against the plaintiffs may take the form of criminal prosecutions for the violation of valid laws, they may not take the form of prior censorship, absent a showing in an adversary proceeding of a clear and present danger.

Justice Mosk of the California Supreme Court, in *Burton v. Municipal Court*, 68 Cal. 2d 684, 696 (1968), succinctly answered the issue when he stated, "It is clear that where First Amendment rights are concerned the statute itself and not the evidence in an individual case establishes the boundaries of permissible conduct. . . ."

A state is not free to adopt whatever procedures it pleases for dealing with obscenity. *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Dancing has always presented a problem to those who see it as representing perils of pagan memories. The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of *Roth*. Clearly the Rules as they pertain to entertainment do not meet that test and were, in fact, designed to circumvent it.

#### *The Twenty-First Amendment Argument*

Section 2 of the Twenty-First Amendment provides that:

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), Mr. Justice Douglas held that in regard to liquor regulations the government has an unquestioned right to enact legislation to assure that the taxing power of the government over the liquor industry is effective. In *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (January 19, 1971), he stated that the police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment, citing *Crane v. Campbell*, 245 U.S. 304 (1917). Yet it was stated by all Justices, including those who dissented on the doctrine of abstention, that the interest of a state in regulating the liquor business cannot override the Due Process Clause of the Fourteenth Amendment. If it cannot override that clause, it certainly cannot override the First Amendment, which has always received a "preferred position" among the liberties granted to all of us. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

All of the cases cited to the court by the Department interpreting the Twenty-First Amendment involved the inter-relationship of that Amendment with the commerce clause and the import-export clause of the Constitution. It is clear that other clauses in the Constitution may not be used to restrict obscenity without complying with the standards established by the Supreme Court. See *Blount v. Rizzi*, 39 U.S.L.W. 4120 (January 14, 1971).

While it is true that one does not have an absolute right to receive a liquor license, it is equally true that the state cannot place an unconstitutional precondition on the possession of those licenses. As the Supreme Court noted in *Sherbert v. Vernon*, 374 U.S. 398 (1963): "It is too late in

the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing conditions upon a benefit or privilege." The fact that no direct restraint or punishment is imposed upon the exercise of speech does not determine the free speech question. Indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines or injunctions. *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950). Thus, a state agency cannot exercise its constitutional power to issue, renew or revoke liquor licenses for the purpose of censoring whatever it believes to be undesirable entertainment. To allow this would allow states to circumvent the protection provided by the First Amendment and do indirectly that which they cannot do directly.

#### *Obscenity Must Be Determined by the Courts*

The Supreme Court, in explicit terms, has stated that the issue of obscenity must be determined by the courts and not merely by an administrative agency, no matter how well meaning it is.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court held that any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments: (a) any restraint prior to judicial determination must be imposed only briefly; (b) the censor must go to court in a specified brief period; and (c) the safeguards must be contained in the statute itself or be supplied by judicial rule.

In *Blount v. Rizzi, supra*, the Court strengthened the requirement that even in noncriminal cases only the courts have the constitutional authority to determine obscenity, and that judicial review must be a swift one. There the Court

cited *Freedman v. Maryland, supra*: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58.

The Rules adopted by the Department of Alcoholic Beverage Control are totally void of any requirement that the Department seek any judicial review of obscenity. The very limited judicial involvement is set forth in California Business and Professions Code § 23090, which provides that:

"Any person affected by a final order of the [Alcoholic Beverage Control Appeals Board], . . . may, . . . apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order."

In fact, as set forth previously, the Rules were designed to circumvent court decisions dealing with obscenity and to eliminate judicial determinations. That is constitutionally impermissible.

The procedure set forth by the Rules and the California Business and Professions Code requires the licensee to challenge the decision of the Department to suppress obscenity. This method was condemned in *Blount v. Rizzi, supra*, "the scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure . . . , or even any procedure assuring prompt judicial review". 39 U.S.L.W. at 4122. Judicial review of the decisions of the Department is limited to appellate review (California Business and Professions Code §§ 23090-23090.7), which does not meet the standard required by *Freedman v. Maryland, supra*, and *Blount v. Rizzi, supra*.

In summary, we hold that the Rules of the Department as written, which prohibit the content of movies and live entertainment, are void for the reason that they do not conform to the tests established by the United States Supreme Court. The other parts of the Rules, namely, those that regulate (a) the attire of waitresses; (b) the conduct between performers and customers; (c) the place where certain entertainers must perform; and (d) the adoption of local regulations provided they comport with the United States Constitution are not challenged.

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, a judgment shall be entered in each of the three cases in favor of the plaintiffs and against the defendants as follows:

"1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

"2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

"3. Each party shall bear its own costs.

"4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes."

Dated this 6th day of April, 1971.

/s/ WALTER ELY  
United States Circuit Judge  
/s/ WARREN J. FERGUSON  
United States District Judge

**APPENDIX A**

**"143.2 Attire and Conduct.** The following acts or conduct on licensed premises are deemed contrary to public welfare and morals and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

"(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

"(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

"(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

"(4) To permit any employee or person to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

**"143.3. Entertainers and Conduct.** Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale

license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six-feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision of application, and to this end the provisions of this rule are severable.

"*143.4. Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or the anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

"143.5. *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance."

*Appendix*  
APPENDIX B

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I

*Partial Testimony of Captain Robert Devin  
of the Los Angeles Police Department*

"CAPT. ROBERT A. DEVIN: Mr. Chairman, I'd like to introduce myself. I'm Capt. Robert Devin, commander of the administrative vice division of the Los Angeles Police Department. I have been a member of the police department in the City of Los Angeles for the past twenty-one and a half years. I have been assigned in my current assignment as the commander of the administrative vice division for the past one and a half years. Part of my responsibilities are the coordination, the review of the problem of pornography and obscenity throughout the City of Los Angeles. And in that capacity, I have formed some opinions. I believe I have documented the position that I am about to state to the group, and I'd like to share this information with the rules committee this morning.

"The Los Angeles Police Department supports all three of the rules changes that are proposed. We feel that there is a need for a measure of regulation in the field of live entertainment—rather, the field of nudity as pertains to live entertainment. Coincidentally, the City of Los Angeles is embarked at this time on a revised Cafe Entertainment Ordinance for the City of Los Angeles, that has been prompted primarily through recent court decisions. The Barrows Case of January 30th, 1970, has compelled us to re-examine our cafe entertainment permit ordinance, and this is in the process of revision. As a matter of fact, its going to be acted upon by our police commission tomorrow afternoon.

"The main position that we're taking as regards the subject of nudity in locations that are licensed by the Department of Alcoholic Beverage Control, is that there is a compelling need for a separation of the entertainer from the non-entertainer. And this position is based on experience that we have had in the past one and a half years, during which time we've seen the advent and the growth of nude entertainment in our city bars.

"The former novelty of a topless female performer has now been replaced by the bottomless performer. Our first experience, our first knowledge that locations of this type were in existence in Los Angeles occurred approximately in February of 1969. In our opinion, this arose because of a California State Supreme Court decision that followed a prior federal rules, of the stated two important items. No. 1, it gave recognition to the dance as a form of expression, as a form of communication between the performer and the audience, and stated, in effect, that the dance is constitutionally protected under the first amendment. And in the absence of a showing of obscenity, that a dance was constitutionally protected. And secondarily, it imposed, as part of the showing by the people, the necessity for a new contemporary community standard, and that standard would declare to be the standard of the State of California.

"While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography, and of obscenity and of behavior that is associated with this kind of performance."

**II**

*Partial Testimony of Roy E. June,  
City Attorney of the City of Costa Mesa*

"MR. ROY E. JUNE: Good morning, gentlemen. My name is Roy E. June, and I am the City Attorney for the City of Costa Mesa, and I am here by direction of the City Council of the City of Costa Mesa to support the director in your promulgation of rules and regulations relating to topless and bottomless entertainment.

"The vigilant and reasonable attention to these establishments by the Costa Mesa Police Department has further served to place these activities in their proper perspective. The courts, however, have not been as generous. Section 647(a) of the Penal Code, lewd and dissolute conduct, is no longer available to the prosecution. We can use it under some circumstances, but not as extensively as we could in 1967.

"Portions of Section 615½ of the Penal Code, on indecent exposure, is not as available to the prosecution as it was in the year 1967. There have been inroads on these cases.

"Regulation of live entertainment, unless so broad to be cumbersome and unworkable, is no longer available to the prosecution. It remains, I think, for the Alcoholic Beverage Control Board to effectively regulate bottomless and topless dancers, and pornographic films displayed in these establishments."

**III**

*Partial Testimony of Richard C. Hirsch  
of the office of the Los Angeles County District Attorney*

"In 1969, the Los Angeles County District Attorney's office filed approximately 781 cases involving bottomless dancing. And almost all of these cases involved perform-

ances which were conducted on premises licensed by the Department of Alcoholic Beverage Control. They are almost all bar-type establishments. As of January 1st, 1970, there were approximately 134 convictions under Penal Code statutes. Now, we have to consider what a conviction means in terms of the criminal law. Most of the cases filed were either under Penal Code Section 647(a) as it then applied, or Section 314.1 of the Penal Code. These are the lewd and indecent exposure statutes. Most of the dances involved totally nude dancing or bottomless-type dancing. There were a few dances, some of which I personally prosecuted which involved topless-type dancing in which the dancer would wear a bikini-type bottom and then be exposed from the waist up without any sort of covering. To convict under the statutes under which these cases were filed, it had to be proven that the dance was obscene, and it had to be proven that such a dance was obscene beyond a reasonable doubt. As you no doubt know, the lewd conduct and indecent exposure statutes use words such as 'lewd,' 'lewdly,' 'dissolute,' but these words have been held to be synonymous with obscene. Therefore, to prove that there was a violation of the criminal law, we had to prove that the three elements of obscenity were established, and prove that these elements were established beyond a reasonable doubt, each to a reasonable doubt, and beyond a moral certainty. The three elements of obscenity are, number one, that the dances were substantially beyond customary limits of candor in the community, and the Supreme Court of the United States held in the Giannini case that the community which was relevant was the entire State of California. Secondly, it had to be shown that the predominant appeal to the dance was to the prurient interest, and that is a shameful or morbid interest in nudity, sex or excretion.

And third, it had to be shown, and beyond a reasonable doubt, each of these standards, that the dances in question were utterly without redeeming social importance. . . .

\* \* \*

"Take an average case. Suppose we have a bottomless dance case and there is a citation issued on the dancer. And, say, the owner of the establishment who is present for aiding and abetting, that case would then be brought into the court. Generally what would happen, and this is the procedure we find in most of the defense in most of these cases, there may be a demur to the statute by the defense on the grounds that the statute on its fact is unconstitutional. We have to send a deputy into court to prosecute that demurrer. Then, generally, the defense requests a pretrial hearing. And the pretrial hearing is, in effect, a separate trial. It's a full-blown trial in which ordinarily expert testimony is taken on the part of the defense and the prosecution to establish whether or not the material, the dance in question is constitutionally protected. At that time, the judge rules on whether or not it's constitutionally protected. If he rules it is not constitutionally protected, it has been the practice for the case to go up on a writ, prohibition or mandate at that time to the appellate department of the Superior Court. At that time, we have an appellate deputy who would represent our office in the appellate department on that case. Then the case will more often than not come back to the trial court. At that time, we will engage in a full trial, either court or jury trial, which may last anywhere from a few days to a week or more. And, of course, this involves a deputy being tied up in the court for this entire period of time. So, there is, on each case, the possibility of a great deal of time being expended by trial deputies in these proceedings.

"MR. SEXTON: Well, I was interested in the—or concerned about the public welfare in asking that, wondering

how much it might cost the taxpayer to have to devote this amount of man-power to this type of entertainment.

"MR. HIRSCH: I don't have any specific totals for you, but I would assume that there are totals available as to what the cost of a jury trial is in a criminal case per day, and you can figure that out in the number of days that these cases would take. And I think it would be quite a considerable amount of money, plus the fact that expert witnesses must be generally paid. They are usually professional witnesses, psychiatrists in many parts, in many cases psychologists, individuals from the arts and theater who come in and expect to receive some sort of compensation for their time in court. These fees will vary in amount, but, of course, there is that expense also, in that they are first amendment cases that need that type of testimony."

(Addendum to Judge Ferguson's opinion in  
*LaRue, et al. v. State of California*  
(Nos. 70-1751-F, 70-1770-F and 70-1782-F))

GRAY, District Judge, dissenting:

It seems to me that this is a case in which our court should abstain until the courts of California have had an opportunity to consider the constitutional issues here concerned. This conclusion is reinforced by the decisions of the Supreme Court in *Younger v. Harris*, 39 U.S.L.W. 4201 (February 23, 1971) and its five companion cases<sup>1</sup> that were all decided on the same day, and which came after *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (January 19, 1971), upon which the majority opinion here relies. It is true that *Younger* and its companion cases were concerned with whether a United States District Court should

1. *Boyle v. Landry*, 39 U.S.L.W. 4207 (February 23, 1971); *Samuels v. Mackell*, 39 U.S.L.W. 4211 (February 23, 1971); *Perez v. Ledesma*, 39 U.S.L.W. 4214 (February 23, 1971); *Dyson v. Stein*, 39 U.S.L.W. 4231 (February 23, 1971); *Byrne v. Karalexis*, 39 U.S.L.W. 4236 (February 23, 1971).

enjoin a currently pending state criminal prosecution, which is a somewhat different issue from the one here involved. However, a principal thrust of those opinions is to suggest to our three judge courts that we should give increased consideration to the concept of comity, which embodies ". . . a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris* 39 U.S.L.W. 4201, 4203 (February 23, 1971). This seems to me to be a good case in which to apply this principle.

The California courts are just as able as are we to consider whether or not the subject regulations square with the United States Constitution. They should be given the opportunity so to do, and I am by no means persuaded that this record shows them to have declined to assume such responsibility.

Now that this court has determined to rule on the merits of the case at hand, I find myself again in disagreement with the majority. The question here is not simply ". . . whether a state administrative agency may require 'fig leaves' to be worn by entertainers in California" (see majority opinion, page 2). I agree with Judge Ferguson that ". . . it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment. . ." (Majority opinion,

page 11.) However, this valid assertion of the law does not necessarily carry the day in deciding this case.

Dancing without fig leaves may very well be a form of artistic expression protected by the First Amendment. But such a right is not absolute. For example, the state, under its police power, certainly could prohibit nude dancing on the street corner or on the campus of a junior high school. It is also within the police power to prohibit *all* sales of alcoholic beverages and to impose reasonable restrictions upon the conditions under which such sales may be made.

If we acknowledge these things, I do not think that it is beyond the constitutional right of California, through its administrative agency, to say, in its wisdom or lack of wisdom, that lewd or naked dancing (even though not necessarily obscene) and the serving of alcohol do not properly mix, and that although a person may present one or the other, he may not do both at the same place and time.

As the majority opinion indicates, it is conceded that the regulations prohibiting direct personal contact between customers and naked employees are constitutionally enforceable. The opinion also suggests that this is so because such contact and what may result therefrom are offensive to public morals. At the administrative hearing from which the subject regulations stemmed, there was testimony as to some of the horrendous things that an occasional "well-oiled" patron purportedly did to the first girl that he saw, immediately upon leaving a bar after having been aroused and "inspired" by the nude dancing. We might think up logical reasons that would warrant regulations seeking to protect the public morals against on-site offenses, and ignore any subsequent danger. But I believe that nothing in the Constitution requires such a distinction.

DATED: April 2, 1971.

/s/ WILLIAM P. GRAY

William P. Gray

United States District Judge

**Appendix B****IN THE UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

Filed Apr 7 1971

ROBERT LARUE, etc., et al.,

*Plaintiffs*

v.

Civil No.  
70-1751-F

STATE OF CALIFORNIA, et al.,

*Defendants*

DON MACLEAN, etc., et al.,

*Plaintiffs*

v.

Civil No.  
70-1770-FTHE DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, etc.,*Defendants*JERRY D. JENNINGS, etc.,  
et al.,*Plaintiffs*

v.

Civil No.  
70-1782-F

EDWARD J. KIRBY, etc., et al.,

*Defendants***JUDGMENT**

This court having this date filed a memorandum opinion signed by the Honorable Walter Ely, United States Circuit Judge and the Honorable Warren J. Ferguson, United States District Judge, the Honorable William P. Gray, United States District Judge, dissenting, which memorandum opinion constitutes the findings of fact and conclusions of law of the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that a judgment is granted in each of these three cases in favor of the plaintiffs and against the defendants as follows:

1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.
2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.
3. Each party shall bear its own costs.
4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes.

Dated this 6th day of April, 1971.

/s/ WALTER ELY

Walter Ely

*United States Circuit Judge*

/s/ WARREN J. FERGUSON

Warren J. Ferguson

*United States District Judge*

*Appendix C*

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*Attorneys for Defendants*

IN THE UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
Filed—May 5 2 36 PM '71

ROBERT LARUE, et al.,

*Plaintiffs,*

Civil No.  
70-1751-F

v.

STATE OF CALIFORNIA, et al.,

*Defendants.*

DON MACLEAN, et al.,

*Plaintiffs,*

Civil No.  
70-1770-F

v.

THE DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, et al.,

*Defendants.*

JERRY D. JENNINGS, et al.,

*Plaintiffs,*

Civil No.  
70-1782-F

v.

EDWARD J. KIRBY, et al.,

*Defendants.*

NOTICE OF APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that, pursuant to Section 1253 of Title 28 of the United States Code, the defendants hereby appeal to the Supreme Court of the United States

from the Judgment entered herein on April 7, 1971, permanently enjoining said defendants from enforcing: (1) California Department of Alcoholic Beverage Control Regulation 143.3 as it pertains to live entertainment, and (2) California Department of Alcoholic Beverage Control Regulation 143.4.

DATED: April 30, 1971.

EVELLE J. YOUNGER, Attorney  
General of the State of  
California

/s/ L. STEPHEN PORTER  
Deputy Attorney General  
*Attorneys for Defendants.*

**STATEMENT OF SERVICE BY MAIL**

I, Mercedes L. Maes, declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, Calif. 94102; I served a copy of the attached: NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES. (Civil Nos. 70-1751-F; 70-1770-F; 70-1782-F) on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Harrison W. Hertzberg, Esq.  
3540 Wilshire Boulevard  
Los Angeles, CA 90005

Kenneth Scholtz, Esq.  
1515 Redondo Beach Boulevard  
Gardena, CA 90247

Warren I. Wolfe, Esq.  
Donald J. Boss, Esq.  
3859 West Sixth Street  
Los Angeles, California

Each said envelope was then on April 31, 1971 sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 1971, at San Francisco, California.

/s/ MERCEDES L. MAES

4/67

CCP §§ 1013a (Cal. Stats. 1959 c. 345)  
2015.5 (Cal. Stats. 1957, c. 1612)

Subscribed and sworn to before me this 30th day of April 1971.

/s/ THELMA N. CROW

My commission expires December 3, 1971

[Seal]

***Appendix D***

California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, §§ 143.2, 143.3, 143.4 and 143.5) were enacted and filed with the California Secretary of State (Register 70, No. 28) on July 9, 1970.

**"143.2. Attire and Conduct.** The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast, below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the

invalid provision or application, and to this end the provisions of this rule are severable.

143.3. Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.4. Visual Displays. The following acts or conduct on licensed premises are deemed contrary to pub-

lic welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

- (1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
- (2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
- (3) Scenes wherein a person displays the vulva or the anus or the genitals.
- (4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.5. Ordinances. Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance."

**Appendix E**

Limited summary of some of the public welfare and morals factors shown by the record below:

(1) Alcohol acts as a depressant on the control centers of the brain which normally inhibit base behaviors, thus resulting in a release from inhibitions. Hence, persons consuming alcoholic beverages may and do engage in acts and conduct which they would not engage in if not drinking. (Defendants' Exhibit "A", RT 10:9 to 16:19; Defendants' Exhibit "B", Exhs. Nos. 2, 3, 4 and 5)

(2) An individual under the influence of alcohol is more likely to be sexually stimulated by viewing sexual acts, conduct and displays, and is more likely to engage in sexual activity on premises affording such stimulation than on premises which do not. (Defendants' Exhibit "A", RT 406:18 to 407:17)

(3) The presenting of topless-bottomless, nude entertainment, sexual acts and/or visual displays (film or slides) showing sexual acts, on on-sale alcoholic beverages premises has resulted in the following factors adverse to the public welfare and morals:

(a) Overt, improper, unlawful physical acts and conduct by the entertainers and by, or with, the customers. Examples:

—oral copulation of girls by customers, RT 38:19 to 40:1; 41:12 to 41:18; 63:9012; 76:34; 97:1-20; Exhibit #6;

—masturbation by customer, RT 40:26 to 41:6; 64:20-21; 72:1-18; 109:22 to 111:22; 154:8-18;

—inserting money from customers into her vagina or rubbing money on vaginal area, RT 43:23 to 43:1; 151:25 to 153:11;

—placing cream on pubic area and customer removing same with mouth, RT 59:7 to 62:5;

—customers touching girl's genitalia, RT 63:9-12; 97:1-20;

*Appendix*

- customers with rolled up currency in mouths placing same in girl's vagina, RT 63:15-20;
- customers using flashlights rented by licensees to better observe girls' genitalia, RT 63:12-15; 136:24 to 137:3;
- customers caressing girls' breasts, RT 63:20-21; 76:19-22;
- customers placing dollar bills on bar and girls attempting to squat down and pick up same with their vulvas, RT 75:17-23; 99:3-7;
- girls urinating in beer glass and giving glass back to customer, RT 75:23-25;
- girls sitting on bars and placing their legs around customers' heads; RT 76:2-3; Exhibit #6;
- girls placing their breasts in customers' beer, RT 76:19-22;
- customers grabbing, kissing and fingering girls, RT 77:19-25;
- girls taking customers' eye glasses and rubbing on their breasts and genital areas, RT 151:25 to 153:11;
- on sale premises serving hot dogs, girls ask customer: "with or without?", if customer says "with", girl rubs hot dog in her vaginal area before serving same to customer, RT 98:24 to 99:3;
- customers dropping and placing money inside girls' panties, customers unzipping girls' clothes, girls rubbing customers faces in their breasts, girls placing their exposed vaginal area close to customers' faces, girls simulating masturbation with finger, customers kissing girls' nipples, customers' faces in girls' crotch areas, customers' mouth on girls' panties, RT 129:21 to 135:2; Exhibits 10, 11 and 13;
- girls placing own nipples in their mouth, combing their pubic area with customers' comb and asking customer to kiss comb, girls leaving stage and sitting on customers' laps with customers touching and sucking on breasts, RT 129:21 to 135:2;

—use of cucumber, dildoes, bananas, candles and other phallic symbols to simulate intercourse and other sexual activities, RT 159:13 to 160:2; 193:23 to 194:17;

—pouring beer between breasts and collecting same in beer glass held below the pubic area, RT 296:2-6;

and as to other acts and conduct see RT 33:4-11; 15-19; 62:6-12; 76:24 to 77:13; 89:1-14; 95:2 to 96:19; 139:10-20; 141:21; 155:11-19; 156:3-8; 173:16 to 174:2; 295:30 to 196:1; 302:21-24; 304:12-14.

(b) "B-girl" activity, soliciting of drinks. RT 79:9-13; 79:20 to 80:7; 82:1-10; 83:18 to 84:7; 85:15 to 86:1; 88:18-24; 151:25 to 153:11; 337:20-26; 345:21 to 346:7; 363:5-14; 540-541. Where in 1964, San Francisco was almost free of "B-girl" activity, topless-bottomless bars has result in "B-girl" activity reaching epidemic proportions, RT 79:9 to 80:7.

(c) Prostitution in and around such premises, including solicitation on the premises involving some of the dancers, and acts of prostitution in dressing rooms, RT 45:26 to 46:3; 53:13-17; 79:9-17; 82:1-10; 85:15 to 86:1; 115:16-26; 121:1-11; 125:21 to 126:17; 153:12 to 154:8; 154:19-23; 161:10-19; 173:16 to 174:2; 194:24 to 195:3.

(d) Sale, possession and use of narcotics and dangerous drugs in and around such premises; RT 54:7-10; 79:9-13; 84:8 to 84:9; 126:6-17; 161:10-19; 348:5-16.

(e) Other violent crimes in and around premises including shootings, robberies, assaults, kidnappings and murders, RT 79:9-13; 80:8-13; 87:22 to 88:13; 194:24 to 195:3; 355 to 356.

(f) Exploitation of customers, including charging \$3 for a drink, soliciting the money for operation of coin-fed film projectors, soliciting money for jukebox, renting flashlights so customers can better observe girls' vaginal areas, etc.,

RT 80:20-24; 129:12-20; 138:12 to 139:9; 363:5-14; 63:12-15;  
136:24 to 137:3.

(g) Overt sex crimes resulting from drinking and viewing such entertainment on on-sale premises, including indecent exposure to young girls, attempted rape, and rapes, RT 23:17 to 24:10; 111:23 to 113:8; 115:14-15; 125:21 to 126:5; 135:7 to 136:15; 151:6-19; 199:4-20; 267:16-25.

(h) Drunkenness and intemperance on such premises, RT 194:24 to 195:3; 300:9 to 301:4; 345:21-346:17.

(i) Minors on premises, RT 182.

(j) Serious and extensive law enforcement problems. On-sale premises offering such nude entertainment and/or films displaying sexual acts have very serious and extensive attendant and resulting police problems due to the crimes being committed on and around such premises. Availability of alcoholic beverages for consumption and the proximity of the girls to the customers in on-sale premises results in police problems not prevalent in non-licensed theaters offering such entertainment. The seriousness of the police problem increases and progresses as the entertainment offered progresses from topless to bottomless to the actual sex acts, live or on film. RT 22:22 to 23:14; 28:4-5; 33:4-11; 44:13-20; 44:24 to 45:7; 52:16 to 53:12; 54:10-15; 81:3-8; 85:11-20; 86:18-23; 87:5-14; 99:17-25; 108:14 to 109:10; 115:14-26; 120:11-21; 125:21 to 126:5; 149:8-18; 163:11 to 166:1; 166:21 to 168:26; 170:6-9; 169:6-11; 171:24 to 172:19; 186:18-26; 187:12 to 188:5; 194:18; 196:1-12; 265:8 to 266:15; 268:7-14; 269:9-17; 296:11-14; 297:22-26; 330:24-26; 342:16-26; 343:1-6; 347:2-5; 348:17; Exhs. Nos. 15, 16 and 17.

(k) Assaults on police officers at such premises, RT 113:9 to 115:10; 189:22 to 191:5; 299:21-24; 347:22-26.

(l) et cetera.

In addition, an examination of the hearing record and exhibits will demonstrate the extensive number of alcoholic beverage control violations and the conditions contrary to public welfare and morals which occur on premises offering such non-verbal acts and conduct. See specifically RT 534 to 616; 642 to 703; Exhibits 43 to 67. The films being shown on licensed premises, and included in the exhibits, show everything from actual sexual intercourse and oral copulation between persons, to intercourse between a girl and a dog, to a man defecating on a nude girl and rubbing his bowel movement all-over her breasts and body.

~~FILE COPY~~

IN THE  
SUPREME COURT OF THE  
UNITED STATES  
October Term, 1971  
NO. 71-36

Supreme Court  
FILE  
NOV 24

E. ROBERT SEAVE

STATE OF CALIFORNIA, DEPARTMENT  
OF ALCOHOLIC BEVERAGE CONTROL,  
et al.

Appellants,

vs.

ROBERT LA RUE, et al.,

Appellees.

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

MOTION TO AFFIRM OR DISMISS

---

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IN THE  
SUPREME COURT OF THE  
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October Term, 1971  
NO. 71-36

STATE OF CALIFORNIA, DEPARTMENT  
OF ALCOHOLIC BEVERAGE CONTROL,  
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APPEAL FROM  
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MOTION TO AFFIRM OR DISMISS

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IN THE  
SUPREME COURT OF THE  
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October Term, 1971  
NO. 71-36

STATE OF CALIFORNIA, DEPARTMENT  
OF ALCOHOLIC BEVERAGE CONTROL,  
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Appellants,

vs.

ROBERT LA RUE, et al.,

Appellees.

---

MOTION TO AFFIRM OR DISMISS

---

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal filed herein be dismissed and that the final judgment of the District Court for the Central District of California be affirmed on the grounds that the case does not present any substantial federal questions.

1.

### STATEMENT OF THE CASE

In addition to the statement of facts set forth in appellant's jurisdictional statement, appellees would call the court's attention to certain stipulations contained in the pre-trial order filed with the District Court. In the pre-trial order, all parties stipulated to the following facts:

"(c) The licensee plaintiffs were and now are doing business within the State of California, and are holders of on-sale Alcoholic beverage licenses issued by the defendants.

"(d) The non-licensee plaintiffs were and now are employed as dancers within the State of California at on-sale alcoholic beverages premises of some of the licensee plaintiffs.

"(e) The defendant DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL is a department and agency of the State of California and was and is established by the

Constitution of the State of California. The defendant EDWARD J. KIRBY is the Director of said Department.

"(f) The defendants enacted Department Rules 143.2, 143.3, 143.4, 143.5, which were filed with the Secretary of State of the State of California and became effective on August 10, 1970. The Rules apply state-wide and have the effect of state law. Said Rules are promulgated as Sections 143.2, 143.3, 143.4 and 143.5 of Title 4 of the California Administrative Code.

"(g) All of the licensee plaintiffs offer entertainment, including dancing on a stage before the patrons, on their licensed alcoholic beverage premises. The non-licensee plaintiffs perform dances on a stage before the patrons, at the licensed beverages premises. During the course of such

dances, acts or conduct occur which fall within the proscribed acts and conduct set forth in Department Rule 143.3.

"(h) The MAC LEAN plaintiffs present at their licensed premises films, still pictures and visual reproductions which depict, among other things, the prohibited acts enumerated in Rule 143.4.

"...

"(j) All of the licensee plaintiffs' premises are open to the public.

"(k) The defendants intend to and will take disciplinary action against the alcoholic beverage licenses of licensees violating Department Rules 143.2, 143.3, 143.4 and 143.5.

"(l) Plaintiffs will suffer irreparable injury if their on-sale alcoholic beverage licenses are suspended or revoked.

"(m) An actual controversy

exists between the parties and the parties desire a declaration of their rights with respect to the constitutionality of the Department Rules in question."

In addition, certain facts were not admitted by appellant, but appellant did not contest the facts by evidence to the contrary. The facts were as follows:

"(b) Plaintiff licensees:

"(i) prohibit the attendance of minors, and cause the entrances of their premises to be policed to assure the non-entrance of minors; and

"(ii) post conspicuous signs at the entrances which read as follows:

'IF YOU WOULD BE OFFENDED BY NUDE ENTERTAINMENT DO NOT COME IN', and 'WARNING, THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED DO

NOT ENTER'; and  
"(iv) display signs and  
advertisements which  
convey only, normal  
description of the enter-  
tainment, e.g., 'Nude  
Entertainment'."

#### Questions Presented.

1. The question is whether a State can constitutionally proscribe certain specified "free speech" and "expression" under all circumstances because it occurs in connection with the State's Twenty-First Amendment rights; i.e: the sale and consumption of alcoholic beverages.
2. Are there two "free speech" standards, one in a barroom and the other outside the barroom?
3. Does the United States v. O'Brien, 391 U.S. 367 (1968) allow the State of California to disregard the First Amendment inside alcoholic beverage establishments under the guise of the Twenty-First Amendment on the theory that the result of the mixture of alcohol and men gives rise to more important governmental

interests than sober men in a theatre or bookstore.

I

THE FIRST AMENDMENT PROHIBITS  
DIRECT PROSCRIPTIONS OF THE  
SEXUAL CONTENT OF "SPEECH" WHEN  
SUCH SPEECH IS NOT OBSCENE.

---

- A. California Department of  
Alcoholic Beverage Control  
Department Rules 143.3 and  
143.4 Directly Restrict the  
Content of Speech.
- 

The Department contends that Rules 143.3 and 143.4, which are the subject of this proceeding, are not concerned with speech in any form, but are concerned only with the prohibition of certain so-called non-verbal acts.

Rule 143.4 directly prohibits the "showing of film, still pictures, electronic reproductions or other visual reproductions" which contain actual or simulated depictions of specified sexual

activities or specified portions of the human anatomy. Thus, the Department apparently asserts the proposition that the exhibition of motion pictures, still pictures (including, presumably, photographs, paintings and drawings), electronic reproductions (television, video-tape, holograms), and other visual reproductions (statues, carvings, assemblages) do not come within the First Amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Jacobellis v. Ohio, 378 U.S. 184 (1964).

Rule 143.3 is entitled "Entertainers and Conduct". It expressly provides that "Live entertainment is permitted on any licensed premises, except that" such entertainment may not include depictions of specified sexual acts or portions of the human anatomy, whether such depictions are real or simulated. Live entertainment is also within the First Amendment. Schacht v. United States, 398 U.S. 58 (1970); In re Giannini, 69 Cal.2d 563 (1968).

Thus, the Department's rules do not merely proscribe certain conduct in the

abstract but are expressly framed to restrict the content of recognized forms of speech and expression under the First Amendment. They proscribe certain protected speech under all circumstances if the conduct occurs on a licensed premises,

B. The Rules Restrict the Sexual Content of Speech Which is Not Obscene

---

The District Court correctly held that the Rules in question are unconstitutional because they expressly require the exclusion of specified matters from First Amendment expression without regard to the context in which the depiction is presented and without regard to whether the specified acts when considered in context are patently offensive and are utterly without redeeming social value taking the conduct as a whole. Roth v. United States, 354 U.S. 476 (1-57); Memoirs v. Massachusetts, 383 U.S. 418 (1966); United States v. Reidel, 39 USLW 4523

(1971). In short, the Rules totally ignore the concept of obscenity. These rules would prohibit, for example, the exhibition of the many motion pictures in general circulation which contain scenes of nudity and simulation of sexual intercourse. Rule 143.4 would prohibit the exhibition of unquestioned works of art, running the gamut from Picasso nudes to Greek statues sans fig leaves. Thus, the rules improperly censor non-obscene speech. NAACP v. Button, 371 U.S. 415 (1963). Ironically, they would prohibit the showing of films on premises where only persons over the age of twenty-one could be present while the same film could be shown in a theatre where persons under the age of twenty-one were allowed.

As one of the questions presented, appellant asks if the First Amendment protects any and all non-verbal conduct depicted in live entertainment or film. This is not the proper question. The Rules are invalid not because all acts within their scope are necessarily protected by the First Amendment, but

because some acts within their scope may be. Such overbreadth is sufficient to establish an unconstitutional restraint on free expression. Shelton v. Tucker, 364 U.S. 479.

## II

THE DEPARTMENT'S RULES CANNOT BE JUSTIFIED AS A VALID INCIDENTAL REGULATION OF THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES.

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A. The Rules Do Not Meet the Criteria of United States v. O'Brien.

---

Appellant incorrectly asserts that Rules 143.3 and 143.4 satisfy the requirement set forth in the following passage from United States v. O'Brien, 391 U.S. 367, 376-377 (1968):

"This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a

P

sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment Freedoms.

...we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Rules 143.3 and 143.4 fail to meet the O'Brien criteria for the following reasons:

1. This is not a case where speech and non-speech elements are combined;

the rules deal directly with speech alone in the form of exhibitions of motion pictures, plays and dancing. Therefore, the regulations are not incidental.

2. The rules directly suppress free expression and are therefore not incidental.

3. The restrictions on free expression are greater than necessary. Most of the evils are already prohibited by valid laws. There is no showing that such broad rules are necessary to achieve the desired results. Butler v. Michigan, 352 U.S. 350 (1956); Coates v. Cincinnati, 402 U.S. 611 (1971).

The Department's rules censor the content of speech for the purpose of controlling the evils that allegedly follow from such communication. The Department cannot escape the limitations of the obscenity standard by calling the rules incidental.

B. The State Does Not Have  
Greater Powers of  
Regulation Because  
Alcoholic Beverages are  
Involved.

---

1. The Twenty-First  
Amendment is not  
Involved.

---

Appellant cannot claim that the Rules in question derive from the Twenty-First Amendment since there is nothing in the rules that concern interstate commerce in alcoholic beverages. Hostetter v. Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1 (1971).

2. The State's Police  
Power Over Alcoholic  
Beverages Does Not  
Justify These Rules.

---

The Rules cannot be justified as an exercise of the police power of the

state to control the use of alcoholic beverages. Whatever the scope of that power might be, it is necessarily governed by the overriding provisions of the First Amendment. Moreover, the Department asserts here not its authority over alcoholic beverages, but its authority over public welfare and morals. Surely the State's power over public welfare and morals is not expanded by the involvement of alcoholic beverages to the extent that it may ignore otherwise applicable Constitutional safeguards. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

The State may indeed have such broad power as to authorize it to prohibit the consumption of liquor altogether in public places. But, this power does not entitle it to condition the issuance or retention of licenses upon the licensees giving up their rights under the First Amendment.

### III

THE DISTRICT COURT DID NOT  
INVALIDATE AND ENJOIN THE  
ENFORCEMENT OF AN OTHERWISE  
VALID STATE REGULATION  
BECAUSE IT MERELY ASSUMED THAT  
THE REGULATIONS WERE PROMPTED  
BY IMPROPER MOTIVES.

---

In its opinion the District Court said:

"However, a fair reading of  
the transcript of the hearings  
requires the conclusion that  
the Department not only desires  
to prohibit sexual conduct  
between dancers and customers,  
but wanted to establish a set  
of rules which would circumvent  
the United States and  
California Supreme Court deci-  
sions relating to obscenity."

LaRue v. State of California,  
Civil No. 70-1751-F, pgs. 7-8  
of the Appendix to Appellant's  
Jurisdictional Statement.

Elsewhere, the District Court stated:

"It is evident from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers."

LaRue v. State of California, Civil No. 70-1751-F, Appendix to Appellant's Jurisdictional Statement, page 13.

Neither of the above excerpts from the opinion, nor anything else in the opinion, establish that the decision of the District Court was based upon an assumed improper motivation in the enactment of the Rules. On the contrary, the statements quoted above are reasonable deductions from the text of the Rules themselves. In any event, such conclusions are incidental and do not serve as the ultimate basis for the legal conclusions drawn by the Court.

Moreover, the statements quoted above were not the results of mere assumptions by the trial court. The statements constitute reasonable inferences from the administrative record which was supplied to the Court by Appellants and from the arguments presented to the District Court by Appellants.

Finally, we would observe that Appellant's arguments under III is based upon the proposition that the Rules are "otherwise valid". Since, as already established, the Rules are not otherwise valid, Appellant's argument is without merit.

CONCLUSION

For the reasons stated hereinabove, the issues raised by Appellant in its jurisdictional statement contain no substantial federal question. Therefore, the appeal should be dismissed and the decision of the District Court should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

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October Term, 1971  
No. 71-36

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STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, *et al.*,

*Appellants,*

ROBERT LARUE, *et al.*,

*Appellees.*

---

On Appeal From the United States District Court  
for the Central District of California

---

**BRIEF FOR THE APPELLEES.**

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**Questions Presented.**

May the State of California suspend, revoke or in any manner discipline a liquor licensee if he permits conduct to occur on the premises when such conduct occurs as an integral part of First Amendment expression, and such expression is not obscene within *Roth v. U.S.* and its progeny?

Do the ALCOHOLIC BEVERAGE CONTROL RULES in question abridge free speech on their face?

If so, may the State of California constitutionally proscribe such conduct on liquor licensed premises under all circumstances?

Where all of the alleged evil results sought to be cured by the ALCOHOLIC BEVERAGE CONTROL RULES challenged herein are prohibited by independent Penal Statutes, may the State of California constitutionally proscribe the conduct therein, which conduct is "prima facie" protected by the First Amendment?

**Statement of the Case.**

In addition to the statement of facts set forth in appellant's brief, appellees would call the court's attention to certain stipulations contained in the pre-trial order filed with the District Court. In the joint pre-trial order, all parties stipulated to the following facts:

"(c) The licensee plaintiffs were and now are doing business within the State of California, and are holders of on-sale Alcoholic beverage licenses issued by the defendants.

"(d) The non-licensee plaintiffs were and now are employed as dancers within the State of California at on-sale alcoholic beverage premises of some of the licensee plaintiffs.

"(e) The defendant DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL is a department and agency of the State of California and was and is established by the Constitution of the State of California. The defendant EDWARD J. KIRBY is the Director of said Department.

"(f) The defendants enacted Department Rules 143.2, 143.3, 143.4, 143.5, which were filed with the Secretary of State of the State of California and became effective on August 10, 1970. The

Rules apply statewide and have the effect of state law. Said Rules are promulgated as Sections 143.2, 143.3, 143.4 and 143.5 of Title 4 of the California Administrative Code.

“(g) All of the licensee plaintiffs offer entertainment, including dancing on a stage before the patrons, on their licensed alcoholic beverages premises. The non-licensee plaintiffs perform dances on a stage before the patrons, at the licensed beverages premises. During the course of such dances, acts or conduct occur which fall within the proscribed acts and conduct set forth in Department Rule 143.3.

“(h) The MAC LEAN plaintiffs present at their licensed premises films, still pictures and visual reproductions which depict, among other things, the prohibited acts enumerated in Rule 143.4.

“...

“(j) All of the licensee plaintiffs' premises are open to the public.

“(k) The defendants intend to and will take disciplinary action against the alcoholic beverage licenses of licensees violating Department Rules 143.2, 143.3, 143.4 and 143.5.

“(l) Plaintiffs will suffer irreparable injury if their on-sale alcoholic beverage licenses are suspended or revoked.

“(m) An actual controversy exists between the parties and the parties desire a declaration of their rights with respect to the constitutionality of the Department Rules in question.”

In addition, certain facts were not admitted by appellant, but appellant did not contest the facts by evidence to the contrary. The facts were as follows:

“(b) Plaintiff licensees:

“(i) prohibit the attendance of minors, and cause the entrances of their premises to be policed to assure the non-entrance of minors; and

“(ii) present entertainment that cannot be viewed from outside the premises; and

“(iii) post conspicuous signs at the entrances which read as follows: ‘IF YOU WOULD BE OFFENDED BY NUDE ENTERTAINMENT DO NOT COME IN’, and “WARNING, THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED DO NOT ENTER”; and

“(iv) display signs and advertisements which convey only, normal description of the entertainment, e.g.,

“Nude Entertainment”.

## ARGUMENT.

### I.

**The Issue Is Not Whether the Acts and Conduct Proscribed by the Rules, in and of Themselves, Constitute "Speech" but Rather When They Are Contained Within the Context of a Dance, Play, Film, Burlesque, Etc., Constitute "Speech".**

Some of the *La Rue* appellees herein are dancers and are employed by other appellees who hold valid ALCOHOLIC BEVERAGE CONTROL licenses. The latter are bar owners and nightclub owners in Los Angeles.

Rule 143.3 refers to "live entertainment" from which the proscribed exception is carved. Rule 143.4 refers to the "showing of film, still pictures, electronic reproduction and other visual reproductions . . ."

The appellees' dancers are known as "topless" and "bottomless" in that they dance "nude" on a stage in a bar or nightclub before a live audience. Other appellees exhibit motion pictures on their premises which would violate Rule 143.4. Though the appellees herein do not offer their patrons other forms of entertainment, it is to be noted that the Rules would proscribe all phases of the performing arts, *i.e.*, burlesque, vaudeville, plays, etc.

All forms of the performing arts, including dancing, are means of expression intended by the Constitution to be protected by the First Amendment.

"The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."

*Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

A common thread woven throughout the history of the dance is that it is an expression of emotions. Fertility, marriage, medicine, war and funerals have formed only the broader categories of innumerable dances which related man to his time and places.

"Dancing consists in the rythmical movements of any and all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas."

7 *Encyclopaedia Britannica*, (1945) 13-14.

The purpose of dance has been communication as a "fundamental remedy for man's anxiety and loneliness". *Meerloo, The Dance*, p. 22 (1960). Dance is used as an outlet for hostilities and passions in societies around the globe. The poet Rilke believed the same emotional tapping of the "furies" of man could be obtained vicariously. And further, at p. 39, *Meerloo* goes on to say:

"Man's need for temporary regression and revitalization . . . are actively satisfied . . . by identifying with dancers on the stage."

In 1623, *DeLauze* wrote *Apologie de la Danse* in defense of the dances new to his era. *DeLauze* justified the variety of new dance forms by citing scripture and the masters of antiquity. From *Plutarach's* note of dance to relieve shock on the battlefield to *Homer's* declaration that "assemblies and feasts cannot be enlivened except by the dance" mankind has used dance to communicate the whole spectrum of human emotions. Those who were inveighing against the new dances of the seventeenth century as "entertaining vice" and offering "enticement to debauchery" sought to make a distinction between traditional dances and the

new controversial ones. *DeLauze* pointed out that the distinction rested upon the customs and orthodoxies the traditional dances were held to communicate and not upon the new dancer *per se*. ". . . the dance itself cannot be blameworthy". *DeLauze, Apologie de la Danse*, p. 61 (1623).

To the argument that it was not steps and measures of the dance but the venuses who led men ". . . in the contemplation of an amorous object, and which finally is followed by a thousand evil desires of concupiscense", *DeLauze, supra*, at page 71, answered, "Whoever would (be offended), he himself is the author of his offense".

The defense of dance during any period of history cannot be separated from other modes of expression. Dance is only a portion of the whole and reflects no more or less than the movement within all the communicative arts. *DeLauze's Apologie* is to be understood in these terms.

"In this the art of dancing merely reflects the pattern of life, for similar changes in language . . . dress, music . . . the theatre and so forth occurred during this period".

*DeLauze, supra*, p. 32.

As it was three centuries ago, so it is today; a new mode of dance is seen by some as a threat to society's morals, when in reality the dance is only one of many areas of communication in the process of expansion.

"The twentieth century has rediscovered the body; not since antiquity has it been so loved, felt and honored. Nobody really aware of what is taking place today needs to be told this . . . our generation does not find what it wants in the bal-

let . . . [and] in gossamer skirts. It cries out . . . for nature and passion".

*Sachs, World History of the Dance*, p. 477 (1963).

The California Courts have ruled that a dance is "speech".

"THE PERFORMANCE OF A DANCE FOR AN AUDIENCE CONSTITUTES A METHOD OF EXPRESSION THAT, IN THE ABSENCE OF PROOF OF OBSCENITY, WARRANTS THE PROTECTION OF THE FIRST AMENDMENT."

*In re Giannini*, (1968) 69 Cal. 2d 563; 72 Cal. Rptr. 655, 446 P. 2d 535.

This Court has held that motion pictures come within the ambit of the Constitutional guarantees of freedom of speech and of the press.

*Jos. Burstyn, Inc. v. United States*, (1962) 343 U.S. 495;

*Jacobellis v. Ohio*, (1964) 378 U.S. 184;

*Pinkus v. Pitchess*, 429 F. 2d 416, Aff'd. *sub nom.*

*California v. Pinkus*, 400 U.S. 922.

The performance of a play is protected by the First Amendment. *Schacht v. United States*, (1970) 398 U.S. 58.

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right . . . Though we see nothing of any possible value to

society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

*Winters v. New York*, (1948) 333 U.S. 507, 510 [92 L. Ed. 840, 847, 68 S. Ct. 665].

## II.

### **The California Department of Alcoholic Beverage Control May Not Impose Restrictions on Licensees Which Deprive Them of Rights Secured by the First Amendment.**

#### **A. Restrictions on Entertainment in Bars and Taverns Are Not Authorized by the Twenty-First Amendment.**

The rules which are the subject of this proceeding are designed to regulate the content of live entertainment, motion pictures and other forms of visual reproductions which may be exhibited or presented to patrons in bars and taverns in the State of California. However, the rules do not in any way restrict the importation, transportation, consumption or sale of alcoholic beverages. Therefore, the rules cannot be said to be justified or authorized by any authority granted the states by the Twenty-First Amendment which repealed prohibition.

Section 2 of the Twenty-First Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

By its own terms the Twenty-First Amendment is concerned with the transportation or importation of intoxicating liquors into a State when the intended delivery or use of such liquor would violate state law.

Traditionally, the courts have characterized the Twenty-First Amendment as being for the purpose of permitting states to legislate in a manner which would otherwise violate the commerce clause. *Carter v. Virginia*, 321 U.S. 131 (1944); *State Board of Equalization v. Youngs Market*, 299 U.S. 58 (1936). However, state liquor regulations are not thereby rendered immune from the commerce clause in all circumstances. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). In *Idlewild* the court held that liquor could be sold free of state tax when sold for delivery in a foreign country, stating, at 377 U.S. p. 332:

“Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”

*Idlewild* is not the only case in which the Twenty-First Amendment has been restricted to regulation of transportation *into* the state. In *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938) the court held that a state could not prohibit shipment through its territory into a national park. In *Johnson v. Yellow Cab Co.*, 321 U.S. 383 (1944) the court affirmed a decision that a state could not prohibit through shipments of imported liquor for delivery to a federal military reservation. Thus, the scope of the Twenty-First Amendment is confined to the exercise of state regulations that affect interstate commerce into its territory.

This conclusion is not negated by broad language contained in some earlier opinions interpreting the

Twenty-First Amendment, since those cases involved commerce clause attacks on restrictions imposed upon imported liquor. In *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404, the court said, "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." *Mahoney* concerned a state law prohibiting the importing of certain beverages. Similarly, other opinions which have referred to grants of "broad" or "plenary" power to the States have been concerned with commerce clause issued: *State Board of Equalization v. Youngs Market*, 299 U.S. 58 (1936) [license required to import liquor]; *Zifferin, Inc. v. Reeves*, 308 U.S. 132 (1939) [restrictions on export sales validly imposed as enforcement measure related to internal sale and consumption].

The rules of the California Department of Alcoholic Beverage Control restricting the content of films and live entertainment are wholly unrelated to the transportation or importation of alcoholic beverages. The rules apply only to on-sale premises, *i.e.* premises upon which alcoholic beverages may be sold and consumed. The rules are not concerned, however, with the sale, consumption or transportation of such beverages nor are they designed to assist enforcement of such regulations. The rules, moreover, have not been challenged on account of any discriminatory effect on interstate commerce, but because they censor free expression protected by the First Amendment. Thus, the validity of the rules must be measured against the scope of the state's domestic police power, without regard to the Twenty-First Amendment.

The conclusion that the Twenty-First Amendment is concerned with interstate commerce rather than with exercise of domestic police power is buttressed and con-

firmed by the Amendment's legislative history and genealogy. The text of Section 2 is based on the Webb-Kenyon Act, c. 90, 37 Stat. 699; c. 740, Sec. 202(b); 49 Stat. 877 (27 U.S.C.A. Sec. 122) which antedates the Eighteenth Amendment and which also prohibits the shipment or transportation of intoxicating liquors into any State, Territory or District with intent that it be received, possessed, sold or used in violation of any law of such State, Territory or District. The Webb-Kenyon Act was entitled "An Act divesting intoxicating liquor of their interstate character in certain cases." It was not repealed by the Eighteenth Amendment, but remained in effect during prohibition. *McCormick and Co. v. Brown*, 286 U.S. 131 (1932). It was concerned only with commerce clause problems and did not purport to otherwise expand or affect the police power of the states. See *State of Georgia v. Wenger*, 94 F. Supp. 976 (Ill., 1950); aff'd. 187 F. 2d 285, cert. den'd. 342 U.S. 822. Similarly, the incorporation of the Webb-Kenyon Act into the constitution at the time of repeal did not affect or enlarge the police power of the states, but merely permitted the exercise of such power free from considerations of interstate commerce in most cases.

**B. The State's Power to Restrict or Censor Speech and Expression Protected by the First Amendment Is Not Increased Merely Because the Use or Consumption of Alcoholic Beverages Is Involved.**

In this section we shall be concerned with the question of whether a state may, in exercising its police power with respect to the sale and consumption of alcoholic beverages, prohibit the exercise of free speech by laws which would otherwise violate the First Amendment. In other arguments we shall show that Rules

143.3 and 143.4 do prohibit speech and expression protected by the First Amendment and that they are not justified by any compelling public purpose.

There are, of course, numerous older cases which suggest the power to control the liquor trade is so broad and untrammeled that a constitutional challenge to any state law, no matter how unconstitutional, arbitrary or discriminatory must fall. e.g. *Crowley v. Christiansen*, 137 U.S. 86 (1890). Such cases were often based upon the proposition that since a state may prohibit the use of liquor completely it may condition its use in any manner whatsoever, e.g. *Cronin v. Adams*, 192 U.S. 108 (1904); *Seaboard Airline Railway v. North Carolina*, 245 U.S. 298 (1917). However, in recent years, the courts have discredited the notion that the exercise of a "privilege" may be conditioned upon the relinquishment of constitutional rights, both with respect to liquor regulation and to such other closely related areas as public employment and the receipt of public grants.

"Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled decision.

"... Neither is the assertion that liquor may be a menace to public health and welfare a sufficient answer to Mrs. Hornsby's allegations. The potential social undesirability of the product may warrant absolutely prohibiting it, or, as the Aldermanic Board has done to some extent here, imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards." *Hornsby v. Allen*, 326 F. 2d 605, 609 (5th Circ., 1964).

The most recent example of these principles is *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), which held that the state could not post a notice characterizing an individual as an excessive drinker and forbidding the sale of liquor to such individual without affording notice and an opportunity to be heard. Thus, it was established that the police power over liquor does not override the due process clause.

This approach was foreshadowed in *Joseph E. Seagrams & Sons, Inc. v. Hostetter*, *supra*, 384 U.S. 35, 46-52 (1966), in which the court upheld a "minimum-price" law for liquor against claims that it violated due process and equal protection. In so doing, however, the court relied on generally applicable standards of due process adjudication without referring to any supposedly extraordinary powers to regulate the sale of liquor.

There are numerous other areas in which the court has held that the granting of a privilege or the performance of a service could not be conditioned in a manner which violated constitutional rights.

In *Shelton v. Tucker*, 364 U.S. 479 (1960) it was held that employment of public school teachers could not be conditioned upon the filing of reports which restricted the freedom of association protected by the First Amendment.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969) it was decided that the right to receive public welfare payments could not be denied upon grounds that amounted to a denial of equal protection and the right to travel between states.

In *Sherbert v. Verner*, 374 U.S. 398 (1963) it was held that unemployment benefits could not be denied to an applicant who refused work for religious

reasons. In that case, the court said, at page 404, "It is too late in the day to doubt that the liberties of religion or expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

In *Speiser v. Randall*, 357 U.S. 513 (1958) the court held that the grant of a tax exemption could not be conditioned upon the exercise of an unconstitutional loyalty oath. In *Baggett v. Bullitt*, 377 U.S. 360 (1964) the court held that public employment could not be conditioned upon the exercise of an unconstitutional loyalty oath.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968) it was held that a public school teacher could not be fired for making derogatory statements about his employer that fell short of actionable libel of a public official under the First Amendment.

Thus, the so-called traditional police power with respect to the control of intoxicating liquor cannot itself justify rules which restrict First Amendment freedoms. Liquor control is not a magic talisman justifying whatever restrictions the state chooses to impose. Rather, so long as the State chooses to permit public drinking in bars and taverns, it may not restrict the privilege of operating such premises in an unconstitutional manner.

It is of the utmost importance that the Supreme Court of the State of California has itself held that California's authority to control the sale and consumption of alcoholic beverages is bounded by the limits set by the United States Constitution. In *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971) the court held unconstitutional Section 25656 of the California Business and Professions Code which prohibited the employment of female bartenders in certain circumstances. In an extensive opinion the court held that

the section was preempted by the 1964 Civil Rights Act, from which no protection was afforded by the Twenty-First Amendment. The court held at 5 Cal. 3d, pages 10-15 that the authority granted by the Twenty-First Amendment to control the importation of intoxicating liquor could not be construed to discriminate in a manner prohibited by the Federal Civil Rights Act. The court also held, at 5 Cal. 3d pages 16-20 that the statute violated equal protection and did not fulfill the compelling public interest necessary to justify a discrimination based upon sex. By so holding the court established that statutes and regulations concerned with alcoholic beverages must be measured by the same constitutional standards as is state action in other fields. It follows that the California Department of Alcoholic Beverage Control cannot claim to possess "traditional power" to ignore such standards, such power having been denied it by the highest court of the State.

### III.

#### **Rules 143.3 and 143.4 Are Overbroad and Vague in Violation of the First and Fourteenth Amendments.**

##### **A. A Governmental Purpose May Not Be Achieved by Means That Invade Constitutionally Protected Rights.**

The principle of overbreadth in First Amendment cases applies where a statute, no matter how precise or clear it may be, sweeps unnecessarily broadly and thereby invades the areas of protected freedoms. *Zwickler v. Koota*, 389 U.S. 241 (1967); note, "The First Amendment Overbreadth Doctrine", 83 Harv. L. Rev., 844, 852-858, 871-882 (1970). "Overbreadth" is a corollary of the rule that even incidental restrictions on First Amendment freedoms will not stand unless drawn with narrow specificity. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963).

The reason behind the rule prohibiting overbroad statutes is that their existence is a *per se* inhibition upon the exercise of First Amendment rights, notwithstanding that enforcement of the law against protected activities in individual cases could be successfully defended on constitutional grounds.

As the court has said:

“A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that may inhibit the full exercise of First Amendment freedoms. See, e.g. *Smith v. California*, 361 U.S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt*, *supra*, 377 U.S. at 379. For ‘[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .’” *Dombrowski v. Pfister*, 370 U.S. 479, 486 (1965).

A law which fails to exclude protected rights should not merely be declared unconstitutional as applied in protected situations, but should be declared unconstitutional in its face as an antidote to the chilling effect on the exercise of such rights caused by the mere existence of the law. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Dombrowski v. Pfister*, *supra*, 380 U.S. 479 (1965); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Butler v. Michigan*, 352 U.S. 380 (1956).

**B. The Constitutional Prohibition Against Overbroad Laws Is Not Limited to Penal Statutes.**

The instant case does not involve penal statutes. It does involve Rules promulgated by the California Department of Alcoholic Beverage Control which set forth grounds upon which a state license to sell alcoholic beverages may be suspended or revoked. This is, however, a distinction without a difference, for it is well established that the First Amendment freedoms embodied in the "overbreadth" rule apply equally to all forms of state action, whether licensing or administrative, whether formal or informal.

In *Bantam Books v. Sullivan*, 372 U.S. 58, 66-67 (1963), the court upheld an injunction against the activities of a State Censorship Commission whose duties were to give informal advice as to the obscenity or immorality of various books but whose advice was not legally binding. The court said,

"it is true that appellant's books have not been seized or banned by the state, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed objectionable and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that the informal censorship may sufficiently inhibit circulation of publication to warrant injunctive relief."

More recently, in *Blount v. Rizzi*, 400 U.S. 410 (1971), the court applied procedural limitations on

censorship of obscenity to administrative proceedings in the Post Office Department. See also *Freedman v. Maryland*, 380 U.S. 51 (1965).

The restrictions on First Amendment rights embodied in Rules 143.3 and 143.4 cannot be justified upon the grounds that such restrictions are related to the control of alcoholic beverages which is a matter of great importance to the state. Violation of those rules could result in the loss of a valuable business and the right to engage in an occupation. In numerous cases, the court has applied the First Amendment protection against overbroad laws to such areas of state concern as the regulation of the practice of law and the selection and retention of public employees and the protection of juveniles. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1970); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *N.A.A.C.P. v. Button, supra*, 371 U.S. 415 (1963); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Butler v. Michigan*, 352 U.S. 380 (1952). Thus, neither the subject nor the source nor the method of enforcement of Rules 143.3 and 143.4 avoids the applicability of the First Amendment protection against overbreadth in the instant proceedings.

**C. Non-Obscene Communications Are Protected by the First Amendment.**

As we have already shown, Rules 143.3 and 143.4 are concerned with controlling the contents of recognized forms of expression which are protected by the First Amendment, including the exhibition of motion pictures, slides, photographs and paintings and the presentation of live entertainment, including plays.

dances, vaudeville and burlesque. It is self-evident that the purpose of the Rules is to prohibit and restrict the depiction of sex and nudity therein. Expression which depicts or portrays sex or nudity is fully protected by the First Amendment unless it is obscene. *United States v. Reidel*, 402 U.S. 351 (1971); *Roth v. United States*, 354 U.S. 476 (1957). In *Reidel*, the court reaffirmed the ruling in *Roth* that obscenity is not within the area of constitutionally protected speech or press. The other side of the coin is that non-obscene depictions of sex or nudity are protected as free speech "from governmental suppression, whether criminal or civil, *in personam* or *in rem*." *Redrup v. New York*, 386 U.S. 767, 770 (1967). Rules 143.3 and 143.4 would therefore be unconstitutionally broad if not restricted to the prohibition of the obscene.

**D. Rules 143.3 and 143.4 Prohibit Depictions of Sex or Nudity Which Are Not Obscene.**

The District Court found that the Rules prohibited non-obscene expression because they failed to take into account the matter as a whole, did not require a determination of the predominant theme of the material, did not consider contemporary community standards, and applied whether or not the presentations had redeeming social importance (Memorandum Opinion, pp. 9-10, 13-14; *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Redrup v. New York*, *supra*, 386 U.S. 767 (1967)).

The correctness of the District Court's ruling does not appear to be in dispute in this appeal. It is appellant's position that the Rules either are not concerned with speech or that alternatively, they are valid incidental restrictions on speech, but appellant concedes

that “[t]he instant State Regulations . . . do not deal with obscenity.” (Appellant’s Brief, p. 15).

The extent to which the Rules ignore the standards of obscenity is evident from their texts. Rule 143.4 prohibits the exhibition of motion pictures, still pictures, electronic reproductions or other visual reproductions which depict acts or simulated acts of sexual intercourse, masturbation, or other sexual acts, whether or not obscene. The Rule prohibits depictions of any person being touched, caressed or fondled on the breasts, buttocks, anus, or genitals, whether or not obscene. The rule prohibits the depiction of scenes wherein a person displays the vulva, the anus or the genitals, whether or not obscene. The rule also prohibits the depiction of scenes in which artificial devices, inanimate objects or drawings are used to portray any of the prohibited activities. Rule 143.3 imposes the same restrictions on live entertainment of all types. Rule 143.3 additionally forbids display of the pubic hair, which effectively prohibits the use of total nudity in live entertainment, and forbids as well even the “simulation” of nudity and all the other acts described above.

The fatal defect in these rules is that they ignore the constitutional requirement that the work must be judged as a whole, rather than on the basis of isolated passages. *Roth v. United States*, 354 U.S. 476 (1967). By enacting these Rules, appellant has attempted to turn back the clock by substituting a series of *per se* prohibitions that would condemn a film or live performance without regard to its predominant appeal or social value. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Redrup v. New York*, 386 U.S. 767 (1967). It follows that the Rules would prohibit the exhibition of films or performances which are not ob-

scene and which are therefore entitled to full protection under the First Amendment. *Redrup v. New York*, *supra*.

The validity of these conclusions is buttressed by the fact that the rules would forbid the exhibition in a bar of films or live entertainment which has been held not to be obscene. Both rules 143.3 and 143.4 would prohibit complete nudity, which has been held on numerous occasions not to be obscene as a matter of law. *Central Magazine Sales Ltd. v. United States*, 389 U.S. 50 (1967) (reversing a finding of obscenity with respect to magazines containing photographs which focused attention on the female pubic area; case below, *United States v. Central Magazine Sales Ltd.*, 318 F. 2d 821 (4th Cir. 1967); *Luros v. United States*, 389 F. 2d 200 (8th Cir. 1968) (holds that pictures depicting male and female pubic hair or genitalia are not obscene). Under Rule 143.4, such pictures could not be displayed in a bar or tavern, even though they are not obscene.

In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), this court held that a movie, "The Lovers" which contained an "explicit love scene" was not obscene. Whether the scene depicted actual or simulated sexual intercourse, the film could not be shown in a bar in the State of California, notwithstanding that the film was held not to be obscene. In *Pinkus v. Pitchess*, 429 F. 2d 416 (9th Cir. 1969), aff'd. *sub. nom. California v. Pinkus*, 400 U.S. 922 (1970), a film depicting a nude female who lays on a couch, undulating and feigning sexual satisfaction was held not to be obscene. That film could not be shown in a bar under Rule 143.4. See, also, *United States v. 35 m.m. Motion Picture Film*, 432 F. 2d 705 (2nd Cir. 1970); *United States v. One*

*Carton Positive Motion Picture Film*, 367 F. 2d 889 (2d Cir. 1966).

The true purpose of the Rules is clear both from their texts and the arguments proffered by Appellant in their support. That purpose is to impose a prior restraint on speech which is not itself unlawful or harmful to others but which is believed to induce other violations of other laws. The Rules are akin to statutes which prohibit incitements to riot. They seek to prevent harms indirectly and at a distance; they are some distance removed from the evil sought to be prohibited.

Examples of Appellant's position are readily drawn from its brief. On page 3, at footnote 2, Appellant characterizes the record as establishing that certain consequences injurious to public welfare and morals *result from* or are *attendant to* the acts and conduct prohibited by the Rules. There follows a list of such consequences, *most of which are not directly prohibited by the Rules, and all of which are prohibited by other statutes and Rules* (See Appendix I to this brief). On pages 5 through 9 of Appellant's Brief, a detailed list is set forth of the act and conduct allegedly "*resulting from*" the presentation of live entertainment or the exhibition of visual displays as prohibited by Rules 143.3 and 143.4. Of the items contained in the list, those listed under (b) through (1) on pages 7 through 9 are expressly concerned with acts not prohibited by Rules 143.3 and 143.4. Of the items listed under (a) on pages 5 through 7, only a few are directly prohibited by Rules 143.3 (none of the items listed involve so-called visual displays); many of those items are also prohibited by other laws or by portions of Rules 143.2 and 143.3 which were not held invalid by the District Court (See Appendix I to this brief).

Thus, Appellant's parade of horribles is not a list of evils directly prohibited by Rules 143.3 and 143.4 but is rather a list of evils which Appellant feels will be *indirectly* prevented by imposing restrictions on speech and expression which it is thought might induce or promote such evils.

But, as is implicit in Appellant's argument, virtually all the wrongful acts listed in his brief are already unlawful (See Appendix I). Indeed, the testimony from which the list was compiled was given by law enforcement officials who are reciting events that had been the subject of arrests and prosecution. The State is not lacking in tools to enforce such laws, as much as it may complain about the expense and inconvenience of such enforcement.

At page 15 of its brief, Appellant again underscores the proposition that these rules are overly broad by stating:

“The instant State regulations however do not deal with *obscenity*. In the instant regulations, the State is not attempting to proscribe the acts and conduct because they are *obscene* and therefore contrary to public welfare and morals, but because of other important and substantial state interests which are injured when such acts and conduct are permitted on premises wherein the public are consuming alcoholic beverages.”

Again, at page 20 of its brief, Appellant argues that:

“The instant regulations further substantiate State interests by preventing the employment and use of such conduct and displays on on-sale alcoholic beverage premises, *thereby removing catalysts* which, when added to the sale and con-

sumption of alcoholic beverages, *induce and produce* such adverse results. In such an important and sensitive area as alcoholic beverage control, *the State should not be required to wait and allow the resultant injurious activities to occur and then discipline the alcoholic beverage licensee only after the harm to the California public has already occurred.*" (Emphasis added).

Thus, Appellant spells out that Rules 143.3 and 143.4 were not adopted to prohibit acts unlawful in themselves but were adopted to prohibit other harms which might result therefrom. The Rules are, therefore, conceded by Appellant to be over broad.

**E. Rules 143.3 and 143.4 Are Unconstitutionally Vague and Uncertain.**

The scope of this attack for vagueness and uncertainty is limited to the words ". . . Simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or sexual acts which are prohibited by law." as used in Alcoholic Beverage Control Rule 143.3 (Entertainers and Conduct) and also as used in Alcoholic Beverage Control Rule 143.4 (Visual Displays).

The classic formulation of the test for unconstitutional vagueness is that of Justice Sutherland in *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 3222 wherein he stated:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part render them liable to its penalties, and a well recognized requirement consistent with ordinary

notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Webster's Collegiate Dictionary defines simulate as follows:

"Simulate: Feigned. To assume the appearance of, without the reality; to feign."

Webster's new International Dictionary defines the word simulate as follows:

"Simulate: To assume the mere appearance of, without the reality; to assume the signs or indications of, falsely, to counterfeit, feign, imitate; as, to simulate insanity or loyalty . . ."

"Where a statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to assume were intended to be made criminal, it would be declared void for uncertainty." *Winters v. People of the State of New York*, 333 U.S. 507, 68 S. Ct. 665.

When one is simulating one of the prohibited acts, must one have an intent to do so? Would the test be a subjective test or should it be an objective test? It is arguable that when one dances (dressed or undressed) in the modern fashion one might to some persons "simulate an act of sexual intercourse." Further, the opening of the mouth by a dancer or the movement of a tongue by a dancer might to some persons simulate an act of oral copulation.

Since the above mentioned common acts of parties could be reasonably assumed not to be violative of the Alcoholic Beverage Control rules when innocently performed as well as not to be violative of the Alcoholic Beverage Control rules, the said rules dealing with "simulated activity" are vague and uncertain and therefore void.

**F. The Department Rules Impose a Prior Restraint, Since They Contain No Requirement of Scienter.**

It has been well observed that the doctrine of constitutional overbreadth, already discussed, exists to protect free speech from the chilling effect and, therefore, prior restraint, of overbroad statutes. Note, "The First Amendment Overbreadth Doctrine", 83 Harv. L. Rev., 844, 846 (1970). We are concerned here with another branch of prior restraint, namely the requirement that a proper statute directed at the control of obscene speech must contain a requirement of scienter.

Thus, in *Smith v. California*, 361 U.S. 147 (1960), the court reversed the conviction of a Los Angeles book seller for selling obscene publications on the grounds that the ordinance under which he was convicted did not contain a requirement that he have any knowledge of the content of the books. The court explained its decision on the grounds that the imposition of strict liability upon a book seller would induce so much self-censorship as to restrict the circulation of constitutionally protected materials. The court said:

"For if the book seller is criminally liable without knowledge of the contents and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected and thus the State will have imposed a restriction upon the

distribution of constitutionally protected as well as obscene literature." *Smith v. California*, 361 U.S. at page 153.

The new rules of the California Department of Alcoholic Beverage Control apply to any of the forms of prohibited activity whether or not the licensee has actual knowledge of the events. Cases cited under other Department rules have made it clear that in California a licensee may "permit" activity on his premises without actually knowing about it.

A recent case involved the suspension of a license for a single act of bookmaking by a bartender. The evidence established that the act was an isolated one and that neither the general manager nor any other responsible officer of the corporate licensee had any knowledge of the act. The court said:

"... a licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. 'There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation.' *Reimel v. Alcholic Beverage Control Appeals Board*, 252 Cal. App. 2d 500, 60 Cal. Rptr. 641, 643 (1967).

The court went on to observe that the absence of a responsible manager from the premises was also irrelevant "in view of the obligation which the constitution places upon the licensee to assure the operation of his business in a manner not contrary to public welfare and morals." *Reimel v. Alcholic Beverage Control Appeals Board*, *supra*, 60 Cal. Rptr. at page 643.

Apparently, then, Rules 143.3 and 143.4 impose strict liability upon a licensee for both obscene and non-obscene acts of his employees in the premises, whether or not he has knowledge of them, and imposes upon him the responsibility, either personally or through responsible employees, of keeping a close watch on both his employees and entertainers to make sure that no violation of the rules occur. Few more pervasive forms of censorship can be imagined.

#### IV.

#### **The Alcoholic Beverage Control Rules Do Not Meet the Criteria Set Down in *United States v. O'Brien* (1968), 398 U.S. 367.**

##### **A. The Rules Abridge Free Speech on Their Face.**

This Court stated in *O'Brien*, at page 374:

"We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended Section 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct."

The Rules herein proscribe conduct only and make no reference to the spoken word. As hereinbefore demonstrated, the First Amendment protects the performing arts unless obscene. The performing arts combine conduct and the spoken word. To proscribe acts of conduct in a performance is to proscribe the performance. Free speech would mean little if it were restricted, in a theatrical performance, to speaking about the content of the play or dance without the right to demonstrate.

Hence, the Rules proscribe the play or the dance or the movie in its entirety, abridging free speech on their face.

**B. The Regulation of the Use and Sale of Alcoholic Beverages Constitutes a State Interest. However, Not Every State Interest Permits Invasion of First Amendment Rights When Such Interests May Be Satisfied by the Use of Less Drastic Measures.**

Appellant cites various evils from the testimony taken before the Director of Alcoholic Beverage Control. In every instance thereof, the conduct is prohibited by a California Penal Code Section, *i.e.*, California Penal Code Section 311 (g).<sup>1</sup>

Appellant insists upon going further. He seeks to prohibit this conduct when it takes place as an integral part of a First Amendment activity, and the activity is not obscene within the meaning of *Roth* and its progeny. Appellant contends that the added element of alcohol in the bloodstream of the customer is the important State interest which permits a curtailment of First Amendment rights. Assuming, *arguendo*, that there is empirical basis for that claim, it would appear to be better practice to limit the customer's content of alcohol rather than to limit the customer's Constitutional rights.

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**1311(g) Penal Code:**

" 'Obscene live conduct' means any physical human body activity whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance."

This is easily accomplished under California's existing laws.<sup>2</sup> If Appellant is concerned about the conduct of the customer that is under the influence of alcoholic beverages, he should strictly enforce California existing consumption laws so that the customer will be under his own influence and therefore be permitted to view any material which does not lose its First Amendment protection when judged by existing standards.

**C. The Rules Being Challenged Herein Do Not Further Any Important or Substantial Governmental Interest. United States v. O'Brien, 398 U.S. 367.**

*O'Brien* stands for the proposition that draft registration cards are necessary to make a selective service system operate efficiently in connection with the Government's power to raise armies. There is no showing in the record that the proscribed conduct, having taken place in the context of a First Amendment activity, results in an increased consumption of alcohol or that the claimed evils necessarily result from the proscribed conduct. In view of the numerous statutes prohibiting the other evils with which the Department purports to be concerned, the instant Rules cannot be said to further any governmental interest in any significant degree. (See Appendix I.)

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<sup>2</sup>647(f) California Penal Code:

"Every person . . . is guilty of disorderly conduct, a misdemeanor; (f) Who is found in any public place under the influence of intoxicating liquor. . . ."

See also Business & Professions Code Section 25602:

"Every person who sells, furnishes, . . . , any alcoholic beverage to . . . any obviously intoxicated person is guilty of a misdemeanor."

**D. The Rules Fail to Meet That Portion of the O'Brien Test Which Requires That the Governmental Interest Be Unrelated to the Operation of Free Expression.**

The governmental interest in *O'Brien* was to create an efficient Selective Service in support of the right of the government to raise armies.

The issuance of a draft registration card has a direct and necessary purpose in the system. Because *O'Brien* chose to demonstrate his objection to the Viet Nam war by burning his draft card, it does not necessarily follow that the 1965 Amendment was enacted to curtail such demonstrations. It had a separate, independent and necessary purpose.

The instant Rules are a direct affront to free expression. There can be no unrelated purpose in that it must be presumed that a customer not under the influence of alcohol should be prohibited from viewing the proscribed acts when they take place in a First Amendment activity any differently than if he saw them in a theatre. If he is under the influence of alcohol, he shouldn't be on the premises at all, (Calif. P. C. §647-(f)), hence the only persons upon whom the rules will have any effect are those customers not influenced by the alcohol.

**E. The Rules Fail to Meet That Part of the O'Brien Test Requiring That the Incidental Restriction on Alleged First Amendment Freedoms Is No Greater Than Is Essential to the Furtherance of That Interest.**

Rules 143.3 and 143.4 are not in any manner of speaking incidental restrictions on free speech. They are directed at speech on their face and impose express restrictions on such speech. They, thus, do not meet the *O'Brien* requirement of being "unrelated to the suppression of free expression."

In this regard, Appellant's attack upon the finding by the District Court that the Rules were intended to circumvent constitutional restrictions relating to the prosecution of obscenity is seen to be unfounded. Appellant, without reference to the record, relies upon the proposition that a court should not assume the existence of improper motives to defeat otherwise valid legislation. The District Court referred to three excerpts from the administrative hearings to support its proposition. It could have cited many more. Almost all of the witnesses who testified before the Department of Alcoholic Beverage Control in support of the Rules were law enforcement officers or prosecuting attorneys. Almost to a man they requested enactment of the Rules to relieve their burden of enforcing criminal laws. A common refrain throughout the hearings was the difficulty, cost, delay and uncertainty of criminal law enforcement against dancers and movies. It is thus more than reasonable to conclude that the Rules were designed to circumvent the difficulties attendant upon proving obscenity in criminal cases.

**Conclusion.**

For the reasons stated, it is respectfully submitted that the judgment of the Court below enjoining the enforcement of California Department of Alcoholic Beverage Control Regulations #143.3 and #143.4 should be affirmed.

Dated March 24, 1972.

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## APPENDIX I.

### List of Statutes and Rules Which Directly Prohibit or Regulate the Occurrences Listed on Page 3, Footnote 2 of Appellant's Brief and on Pages 5 Through 9 of Appellant's Brief Under "(3)".

- (a) "Overt Improper and Unlawful Physical Acts and Conduct by the entertainer—employees and by, or with, the customers."

<u>Calif. Penal Code</u>	<u>Conduct Prohibited</u>
Sec. 288(a)	Oral Copulation
Sec. 311.6	Obscene Live Conduct
Sec. 314.1	Indecent Exposure
Sec. 314.2	Aiding, abetting or procuring indecent exposure
Sec. 647(a)	Lewd conduct in Public Place
Sec. 647(b)	Prostitution

- (b) "B-girl" activity, solicitation of drinks."

<u>Calif. Bus. &amp; Prof. Code</u>	<u>Conduct Prohibited</u>
Sec. 25657	Employment of person to encourage or procure purchase or sale of liquor.

- (c) "Prostitution in and around such premises, including solicitation on the premises involving some of the dancers, and acts of prostitution in dressing rooms."

<u>Calif. Penal Code</u>	<u>Conduct Prohibited</u>
Sec. 647(b)	Prostitution and solicitation of prostitution.

- (d) Sale, possession and use of narcotics and dangerous drugs in and around such premises.

**Calif. Health &  
Safety Code  
(partial list)**

Sec. 11500

**Conduct Prohibited**

Illegal possession of narcotics.

Sec. 11501

Illegal sale of narcotics.

Sec. 11721

Illegal use of narcotics.

Sec. 11910

Illegal possession of dangerous drugs.

Sec. 11912

Illegal sale of dangerous drugs.

**Calif. Bus. &  
Prof. Code**

Sec. 24200.5(a)

**Conduct Prohibited**

Knowingly permitting sale of narcotics or dangerous drugs on licensed premises.

- (e) "Other violent crimes in and around premises including shootings, robberies, assaults, kidnapping and murders."

(The various California Penal Code sections applicable to these "violent crimes" need not be listed individually)

- (f) "Exploitation of customers, including charging \$3 for a drink, soliciting the money for operation of coin fed film projectors, soliciting money for jukebox, renting flashlight so customers can better observe girls' vaginal areas, etc."

- (g) "Overt sex crimes resulting from drinking and viewing such entertainment on on-sale premises, including indecent exposure to young girls, attempted rape and rapes."

(The various California Penal Code sections applicable to "overt sex crimes" need not be listed individually)

(h) "Drunkenness and intemperance on such premises."

Calif. Penal Code

Sec. 647(f)

Calif. Bus. &  
Prof. Code

Sec. 25602

Conduct Prohibited

Public intoxication

Conduct Prohibited

Sale of Alcoholic Beverage  
to obviously intoxicated per-  
son.

(i) "Minors on Premises."

Calif. Bus. &  
Prof. Code

Sec. 25658

Sec. 25653

Sec. 25665

Conduct Prohibited

Sale of Alcoholic beverage  
to minors.

Employment of minor in on-  
sale premises.

Minors entering and remain-  
ing on public premises.

(j) "Serious and extensive law enforcement prob-  
lems."

Calif. Bus. &  
Prof. Code

Sec. 25601

Conduct Prohibited

Maintenance of disorderly  
house.

(k) "Assaults on police officers at such premises."

Calif. Penal Code

Sec. 148

Conduct Prohibited

Resisting, delaying or ob-  
structing officer in dis-  
charge of duty.

Sec. 240, 241

Sec. 242, 243

Assault

Battery

- (l) "... alcoholic beverage control violations and the conditions contrary to public welfare and morals . . ."

Calif. Bus. &  
Prof. Code

Sec. 24200(a)

Conduct Prohibited

Continuance of license contrary to public welfare or morals.

Sec. 24200(b)

Violation of Alcoholic Beverage Control Act or Department Rules.

Sec. 24200(d)

Conviction of crime involving moral turpitude.

Sec. 24200(e)

Failure to correct public nuisance.

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# In the Supreme Court of the United States

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OCTOBER TERM, 1971

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No. 71-36

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STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC  
BEVERAGE CONTROL, ET AL.,

*Appellants,*

vs.

ROBERT LARUE, ET AL.,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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### Brief For The Appellants

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#### OPINION BELOW

The opinion of the District Court (App. ) is reported at 326 F. Supp. 348.

#### JURISDICTION

The judgment of the District Court was entered April 7, 1971 (App. ). A notice of appeal to this Court was filed on May 5, 1971 (App. ). The jurisdictional statement was filed July 6, 1971, and probable jurisdiction was noted December 20, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1253.

### **QUESTIONS PRESENTED**

Does the First Amendment protect any and all *non-verbal* conduct (including acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation and flagellation) when the conduct is presented as purported "dancing" or "entertainment" and engaged in live or displayed by film on state licensed alcoholic beverages premises?

Where *non-verbal* conduct occurring on state licensed alcoholic beverages premises contains a communicative or "speech" element sufficient to bring into play the First Amendment, may a federal court require a State to restrict itself to *obscenity* as the only basis by which such conduct may be regulated or limited, or may a State proceed against such conduct regardless of whether or not the conduct is obscene, provided the State's enactments meet the criteria set down by this Court in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)?

May a federal court invalidate and enjoin the enforcement of otherwise valid State regulations by assuming that improper motives prompted such enactments?

### **STATUTES INVOLVED**

The statutes involved are California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, sections 143.2, 143.3, 143.4 and 143.5). The text of these regulations is set forth in the Appendix attached hereto.

### **STATEMENT OF THE CASE**

With the advent of so-called "topless waitresses" on state licensed on-sale<sup>1</sup> alcoholic beverages premises, and the

1. "On-sale" licenses in California authorize the sale and serving of alcoholic beverages to the public for consumption on the licensed premises (such as a bar), as contrasted to "off-sale" licenses authorizing sale of alcoholic beverages to the public for consumption off or away from the licensed premises (such as a package liquor store).

progression therefrom to nudes, to live sexual acts and conduct, and to visual displays (by motion pictures) of such sexual acts and conduct, the State of California has experienced an ever increasing progression of public welfare and morals problems in connection with the operation of on-sale alcoholic beverages premises where such non-verbal acts and conduct are employed and permitted.\*

Initially, while the situation was still in the "topless" only stage, the appellant Department of Alcoholic Beverage Control attempted to prevent the attendant and resulting injuries to the public welfare and morals by notifying such licensees to refrain from such conduct and undertaking to discipline the alcoholic beverages licenses of those who would not desist. Resultant litigation finally reached the California Supreme Court in the case of *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 465 P.2d 1 (1970).

Specifically pointing out that the hearing record before it contained only the sterile stipulation between the parties that bare-breasted waitresses were employed on the licensee's premises, the California Supreme Court held that there was no evidence in the record by which it could conclude that the evils the Department sought to prevent were related to the use of topless waitresses and, therefore, that the Department's disciplining of the license could not be sustained.

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2. The record below establishes that when certain non-verbal acts and conduct are permitted on state licensed on-sale alcoholic beverages premises that attendant thereto, or resulting therefrom, are various injurious consequences to the public welfare and morals, including but not limited to: overt and unlawful sex acts between employees and between employees and the public; "B-girl" activity in the soliciting of drinks; prostitution; sale, possession and use of narcotics and dangerous drugs; sexual crimes including rapes, attempted rapes, and indecent exposures; other violent crimes including assaults on law enforcement officers; intemperance; exploitation of alcoholic beverages customers; and serious and extensive law enforcement problems due to the increase in criminal offenses in and around such premises.

The California Supreme Court then set forth:

"Finally, although it appears unnecessary, we point out that our conclusions have been reached on the record before us. We are not unaware of the public concern for proper regulation of premises licensed to sell alcoholic beverages. Our holding confers on them neither a general sanction to employ topless or similarly undressed waitresses nor a general immunity from the Department's disciplinary action in the event they do. If such purveying of liquor is in fact attended by the deleterious consequences which the Department claims, it should have no difficulty, in appropriate disciplinary proceedings, in proving them. In a word it should establish 'good cause' and make out its case. *Alternatively, the Department could draw upon its expertise and the empirical data available to it and adopt regulations covering the situation.*" (465 P.2d at 16, emphasis added)

Following the *Boreta* decision, and the intervening intensification of problems resulting from the steady progression of sexual acts and conduct on licensed alcoholic beverages premises, the Department—seeking to prevent the "deleterious consequences" from occurring, rather than merely disciplining licenses after such damage to the public welfare and morals had already occurred—proceeded in its quasi-legislative capacity<sup>3</sup> to hold legislative hearings and to secure expert opinions and the available empirical data whereby it could formulate and enact proper regulations for state licensed alcoholic beverages premises.

Thereafter, on the basis of California statutory law, officially reported decisions dealing with conditions resulting

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3. The California Department of Alcoholic Beverage Control is a "constitutional agency" of California state government and is vested with self-executing powers by constitutional grant. (California Constitution, Article XX, Section 22).

on alcoholic beverages premises when certain types of acts and conduct were permitted, several days of legislative hearings (involving the compilation of 703 pages of legislative hearing transcript and the receipt of over 67 exhibits), and review of the expert opinions and available empirical data, the California Department of Alcoholic Beverage Control enacted Department Regulations 143.2 through 143.5. Included in the aforesaid legislative hearing record and exhibits were the following pertinent facts:

(1) Alcohol acts as a depressant on the control centers of the brain which normally inhibit base behaviors, thus resulting in a release from inhibitions. Hence, persons consuming alcoholic beverages may and do engage in acts and conduct which they would not engage in if not drinking. (Defendants' Exhibit "A", RT 10:9 to 16:19; Defendants' Exhibit "B", Exhs. Nos. 2, 3, 4 and 5)

(2) An individual under the influence of alcohol is more likely to be sexually stimulated by viewing sexual acts, conduct and displays, and is more likely to engage in sexual activity on premises affording such stimulation than on premises which do not. (Defendants' Exhibit "A", RT 406:18 to 407:17)

(3) The presenting in on-sale alcoholic beverage premises of topless-bottomless, nude entertainment, sexual acts, sexually oriented conduct and visual displays (film) of such sexual acts and conduct has resulted in the following types of occurrences:

(a) Overt, improper and unlawful physical acts and conduct by the entertainer-employees and by, or with, the customers. Examples (all *RT* references are to Defendants' Exhibit "A", all *Exhibit* references are to Defendants' Exhibit "B"):

—oral copulation of girls by customers, RT 38:19 to 40:1; 41:12 to 41:18; 63:9012; 76:34; 97:1-20; Exhibit #6;

- masturbation by customer, RT 40:26 to 41:6; 64:20-21; 72:1-18; 109:22 to 111:22; 154:8-18;
- inserting money from customers into her vagina or rubbing money on vaginal area, RT 43:23 to 43:1; 151:25 to 153:11;
- placing cream on pubic area and customer removing same with mouth, RT 59:7 to 62:5;
- customers touching girl's genitalia, RT 63:9-12; 97:1-20;
- customers with rolled up currency in mouths placing same in girl's vagina, RT 63:15-20;
- customers using flashlights rented by licensees to better observe girls' genitalia, RT 63:12-15; 136:24 to 137:3;
- customers caressing girls' breasts, RT 63:20-21; 76:19-22;
- customers placing dollar bills on bar and girls attempting to squat down and pick up same with their vulvas, RT 75:17-23; 99:3-7;
- girls urinating in beer glass and giving glass back to customer, RT 75:23-25;
- girls sitting on bars and placing their legs around customers' heads; RT 76:2-3; Exhibit #6;
- girls placing their breasts in customers' beer, RT 76:19-22;
- customers grabbing, kissing and fingering girls, RT 77:19-25;
- girls taking customers' eye glasses and rubbing on their breasts and genital areas, RT 151:25 to 153:11;
- on sale premises serving hot dogs, girls ask customer: "with or without?", if customer says "with", girls rubs hot dog in her vaginal area before serving same to customer, RT 98:24 to 99:3;
- customers dropping and placing money inside girls' panties, customers unzipping girls' clothes,

girls rubbing customers faces in their breasts, girls placing their exposed vaginal area close to customers' faces, girls simulating masturbation with finger, customers kissing girls' nipples, customers' faces in girls' crotch areas, customers' mouth on girls' panties, RT 129:21 to 135:2; Exhibits 10, 11 and 13;

—girls placing own nipples in their mouth, combing their pubic area with customers' comb and asking customer to kiss comb, girls leaving stage and sitting on customers' laps with customers touching and sucking on breasts, RT 129:21 to 135:2;

—use of cucumber, dildoes, bananas, candles and other phallic symbols to simulate intercourse and other sexual activities, RT 159:13 to 160:2; 193:23 to 194:17;

—pouring beer between breasts and collecting same in beer glass held below the pubic area, RT 296:2-6;

and as to other acts and conduct see RT 33:4-11; 15-19; 62:6-12; 76:24 to 77:13; 89:1-14; 95:2 to 96:19; 139:10-20; 141:21; 155:11-19; 156:3-8; 173:16 to 174:2; 295:30 to 196:1; 302:21-24; 304:12-14;

(b) "B-girl" activity, soliciting of drinks. RT 79:9-13; 79:20 to 80:7; 82:1-10; 83:18 to 84:7; 85:15 to 86:1; 88:18-24; 151:25 to 153:11; 337:20-26; 345:21 to 346:7; 363:5-14; 540-541. Where in 1964, San Francisco was almost free of "B-girl" activity, topless-bottomless bars has resulted in "B-girl" activity reaching epidemic proportions, RT 79:9 to 80:7.

(c) Prostitution in and around such premises, including solicitation on the premises involving some of the dancers, and acts of prostitution in dressing rooms, RT 45:26 to 46:3; 53:13-17; 79:9-17; 82:1-10; 85:15 to 86:1; 115:16-26; 121:1-11; 125:21 to 126:17; 153:12 to 154:8; 154:19-23; 161:10-19; 173:16 to 174:2; 194:24 to 195:3.

(d) Sale, possession and use of narcotics and dangerous drugs in and around such premises; RT 54:7-10; 79:9-13; 84:8 to 84:9; 126:6-17; 161:10-19; 348:5-16.

(e) Other violent crimes in and around premises including shootings, robberies, assaults, kidnappings and murders, RT 79:9-13; 80:8-13; 87:22 to 88:13; 194:24 to 195:3; 355 to 356.

(f) Exploitation of customers, including charging \$3 for a drink, soliciting the money for operation of coin-fed film projectors, soliciting money for jukebox, renting flashlights so customers can better observe girls' vaginal areas, etc., RT 80:20-24; 129:12-20; 138:12 to 139:9; 363:5-14; 63:12-15; 136:24 to 137:3.

(g) Overt sex crimes resulting from drinking and viewing such entertainment on on-sale premises, including indecent exposure to young girls, attempted rape, and rapes, RT 23:17 to 24:10; 111:23 to 113:8; 115:14-15; 125:21 to 126:5; 135:7 to 136:15; 151:6-19; 199:4-20; 267:16-25.

(h) Drunkenness and intemperance on such premises, RT 194:24 to 195:3; 300:9 to 301:4; 345:21-346:17.

(i) Minors on premises, RT 182.

(j) Serious and extensive law enforcement problems. On-sale premises offering such nude entertainment and/or films displaying sexual acts have very serious and extensive attendant and resulting police problems due to the crimes being committed on and around such premises. Availability of alcoholic beverages for consumption and the proximity of the girls to the customers in on-sale premises results in police problems not prevalent in non-licensed theaters offering such entertainment. The seriousness of the police problem increases and progresses as the entertainment offered progresses from topless to bottomless to the actual sex acts, live or on film. RT 22:22 to 23:14; 28:4-5; 33:4-11; 44:13-20; 44:24 to 45:7; 52:16 to 53:12; 54:10-15; 81:3-8; 85:11-20; 86:18-23; 87:5-14; 99:17-25; 108:14 to 109:10; 115:14-26; 120:11-21; 125:21 to 126:5; 149:8-18;

163:11 to 166:1; 166:21 to 168:26; 170:6-9; 169:6-11; 171:24 to 172:19; 186:18-26; 187:12 to 188:5; 194:18; 196:1-12; 265:8 to 266:15; 268:7-14; 269:9-17; 296:11-14; 297:22-26; 330:24-26; 342:16-26; 343:1-6; 347:2-5; 348:17; Exhs. Nos. 15, 16 and 17.

(k) Assaults on police officers at such premises, RT 113:9 to 115:10; 189:22 to 191:5; 299:21-24; 347:22-26.

(l) In addition, an examination of the hearing record and exhibits will demonstrate the extensive number of alcoholic beverage control violations and the conditions contrary to public welfare and morals which occur on premises offering such non-verbal acts and conduct. See specifically RT 534 to 616; 642 to 703; Exhibits 43 to 67. The films being shown on licensed premises, and included in the exhibits, show everything from actual sexual intercourse and oral copulation between persons, to intercourse between a girl and a dog, to a man defecating on a nude girl and rubbing his bowel movement all over her breasts and body.

Thereafter, the appellees, who are corporate and individual on-sale alcoholic beverages licensees (plus a few employees in *LaRue et al*), filed declaratory and injunctive relief actions in both the California state courts and in the United States District Court for the Central District of California. The actions basically sought to have the newly enacted regulations declared unconstitutional as in violation of the freedom of speech and due process guarantees of the First, Fifth and Fourteenth Amendments, and their enforcement by the appellant Department of Alcoholic Beverage Control and its officers enjoined. The California state courts (including the California Supreme Court and the California Court of Appeal) refused to stay the enforcement of the regulations and declined to hear the declaratory and injunctive relief actions. The federal District Court then proceeded

with the actions before a specially constituted three-judge Court.

On April 7, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Opinion and Judgment (App. ) holding in substance that the acts and conduct proscribed by Department Regulations 143.3 and 143.4 are within the freedom of speech guarantees of the First and Fourteenth Amendments, that such acts and conduct could be proscribed by the State only upon proper proof of their *obscenity*, that the regulations were prompted by improper motives to circumvent *obscenity* proof requirements, and that the said regulations were therefore invalid as in violation of the First, Fifth and Fourteenth Amendments.

It is from that portion of the Judgment invalidating Department Regulation 143.3 in part and Department Regulation 143.4 in *toto*, and enjoining the enforcement thereof, which appellants have brought this appeal. (App. ....)

#### SUMMARY OF THE ARGUMENT

The instant regulations prohibit the holding of an on-sale alcoholic beverages license on premises which permit certain non-verbal sexual acts, conduct or visual displays. The State has done so because of the serious injuries to important state interests which attend and result from the employment of such conduct and displays on premises wherein the public is consuming alcoholic beverages.

The court below invalidated the regulations on the basis that: (1) conduct presented as purported "dancing" or "entertainment", either live or by way of film, is "speech" and is protected by the First Amendment; (2) First Amendment activity may be restricted by a state *only* upon proof that such conduct is *obscene*; and (3) the enactment of the regulations was improperly motivated by a desire to circumvent the standards of proof required to establish *obscenity*.

The non-verbal sexual acts, conduct and displays proscribed by the regulations do not constitute "speech" and are not within the protection of the First Amendment.

Assuming, arguendo, that such conduct or displays are within First Amendment protection, a state may not be limited to *obscenity* as the only grounds upon which it may restrict such activity. The instant regulations meet the criteria of *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

#### ARGUMENT

- I. **Live Acts or Visual Displays in Public of Sexual Intercourse, Masturbation, Sodomy, Bestiality, Oral Copulation and Flagellation; Public Display of Genitalia and Anuses; and Other Such Non-Verbal Acts and Conduct, Do Not Constitute "Speech" and Are Not Within the Protection of the First and Fourteenth Amendments**

The California Department of Alcoholic Beverage Control regulations which were invalidated and enjoined by the court below prescribe that an on-sale alcoholic beverages license may not be held at any premises where certain non-verbal acts or conduct are permitted, including: (1) acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation and any sexual acts prohibited by state law, (2) display of genitalia and anuses, (3) touching, caressing and fondling of breasts, buttocks, anus or genitalia, and (4) visual displays (films or slides) of the foregoing acts and conduct.

The majority of the District Court found the regulations to be invalid on the basis that such non-verbal acts and conduct were presented within the context of live entertainment and motion pictures and therefore had First Amendment protection. (App. )

Such *non-verbal* acts and conduct do not constitute "speech" and are not entitled to the protection afforded speech by the First and Fourteenth Amendments.

While the protection afforded to verbal and printed speech has been expanded to encompass certain non-verbal acts and conduct engaged in by persons for the purpose of expressing an idea ("symbolic speech"), this does not mean that any and all non-verbal acts and conduct which allegedly are engaged in with the intent of expressing an idea are automatically "speech" and within the protection of the First Amendment. *United States v. O'Brien*, 368 U.S. 367, 376 (1968)\*:

"O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'"

*We cannot accept the view that an apparently endless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.*" (emphasis added)

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4. *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (march against school segregation); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (wearing black armbands in protest against government policy); *Hughes v. Superior Court of California*, 339 U.S. 460 (1960) (picketing); *Stromberg v. California*, 283 U.S. 359 (1932) (display of flag); and see *United States v. O'Brien*, 368 U.S. 367 (1968) (draft card burning) wherein it was assumed that the purported communicative element of O'Brien's conduct (protest against war and draft) was sufficient to bring the First Amendment into play. 391 U.S. at 376.

5. And see *Cowgill v. California*, 396 U.S. 371 (1970) (wearing cut-up or mutilated flag), and the dissenting opinions in *Street v. New York*, 394 U.S. 576, 594-617 (1969) (flag burning), wherein the majority of this Court reversed the conviction on the basis that it was impossible to tell from the record if the conviction was solely for the non-verbal act of flag burning or included the words spoken by the defendant at the time he burned the flag.

Likewise, recognition that communication of ideas by means of motion pictures is within the freedom of speech guarantee, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952), does not, and should not mean that *anything* visually reproduced on film is automatically "speech" and within First Amendment protection. It is the expression or communication of ideas which the First Amendment protects, not the media by which the ideas are transmitted. Blank film itself does not have First Amendment protection. It is incongruous that if the "live" visual display of certain non-verbal acts and conduct is not entitled to First Amendment protection, that a visual reproduction of the very same acts and conduct by means of film achieves such protection.

Without attempting to speculate as to what, *if any*, idea or protest the person exposing his or her genitalia or anus, or the persons engaging in acts of sodomy, oral copulation, masturbation, or bestiality, are attempting to express to the public—or what, *if any*, idea or protest is being expressed to the public if such acts and conduct are visually reproduced on film—it is submitted that such *non-verbal* acts and conduct have no intrinsic or clearly recognizable and significant communicative or "symbolic speech" element entitling them to First Amendment protection. *Cox v. Louisiana*, 379 U.S. 559, 562-564 (1965); *Cowgill v. California*, 396 U.S. 371, 371-372 (1970); and see *Derrington v. City of Portland*, 451 P.2d 111 (Ore.), certiorari denied 396 U.S. 901 (1969).

**II. Assuming, Arguendo, That the Non-Verbal Acts and Conduct, and/or the Visual Reproductions Thereof, Are Within First Amendment Protection, a Federal Court May Not Require a State to Restrict Itself to Obscenity as the Only Basis for Regulation of Such Acts, Conduct and Displays. A State May Regulate and Limit First Amendment Activity on Non-Obscenity Grounds Provided the State's Regulations Meet the Criteria Set Down in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)**

Even if the non-verbal acts and conduct, and/or the visual displays thereof, have a "speech" element entitling them initially to First and Fourteenth Amendment protection, or even if they are found to be inseparably woven into other non-proscribed activities having such protection, the regulations are nonetheless valid as they embody important state interests which clearly outweigh any incidental limitation on such non-verbal, commercial conduct.<sup>6</sup>

The District Court majority took the position that such non-verbal acts, conduct and visual reproductions (films) may be regulated by the State *only* if they are *obscene*, and that the regulations are therefore invalid because they do not concern themselves with *obscenity* and do not require the standards of proof as to *obscenity*. (App. )

Such a legal posture by the District Court majority is clearly erroneous. *Obscenity* is not the only basis upon which a State may regulate or limit First Amendment activity. *Hughes v. Superior Court of California*, 339 U.S. 460 (1950) and *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950) (picketing); *Beauharnis v. Illinois*, 343 U.S. 250 (1952) (libel); *United States v. Harris*,

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6. See *Derrington v. City of Portland*, 451 P.2d 111, 113 (Ore.), certiorari denied 396 U.S. 901 (1969):

"When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours."

347 U.S. 612 (1954) (lobbying); *Breard v. Alexandria*, 341 U.S. 622 (1951) (door-to-door soliciting); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning); and see *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966), and *Purity Extract Co. v. Lynch*, 226 U.S. 192, 201 (1912).

The District Court majority relies on *Roth v. United States*, 354 U.S. 476 (1957), and its progeny. But *Roth* was a criminal *obscenity* case which established that *obscenity* is not afforded First Amendment protection. *Roth* and the subsequent decisions of this Court relating thereto, have dealt with what standards of proof are to be used in determining or establishing *obscenity*. The instant State regulations however do not deal with *obscenity*. In the instant regulations, the State is not attempting to proscribe the acts and conduct because they are *obscene* and therefore contrary to the public welfare and morals, but because of other important and substantial state interests which are injured when such acts and conduct are permitted on premises wherein the public are consuming alcoholic beverages.

This Court clearly set forth in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968) that:

“... This Court has held that when ‘speech’ and ‘non-speech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the inciden-

tal restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Hence, a State may regulate and limit First Amendment activity on non-obscenity grounds so long as the regulations meet the *O'Brien* criteria.

**III. Assuming, Arguendo, That the Non-Verbal Acts and Conduct, and/or the Visual Reproductions Thereof, Are Within First Amendment Protection, the Instant Regulations Embody Important State Interests Which Justify the Limitations Against An On-Sale Alcoholic Beverages License Being Held on Premises Where Such Acts, Conduct and Visual Displays Are Employed or Permitted. The Regulations Clearly Meet the Criteria of United States v. O'Brien, 391 U.S. 367, 376-377 (1968)**

*United States v. O'Brien*, 391 U.S. 367, 376-377 (1968) specifies that a regulation limiting First Amendment freedoms is sufficiently justified:

"... if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The regulations invalidated and enjoined by the court below clearly meet all of the *O'Brien* criteria.

**A. REGULATION AND CONTROL OF THE CONDITIONS SURROUNDING THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES WITHIN ITS BORDERS IS WITHIN THE CONSTITUTIONAL POWER OF THE STATE**

Both traditionally and under the Twenty-first Amendment, a state has broad power to regulate and control the conditions surrounding the sale, use, distribution and consumption of alcoholic beverages within its borders. *United States Constitution, Twenty-first Amendment; Seagram v.*

*Hostetter*, 384 U.S. 35, 41-43 (1966) *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964); *California v. Washington*, 358 U.S. 64 (1958); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); *Crowley v. Christensen*, 137 U.S. 86, 91 (1890). This Court has recently refused to review California alcoholic beverage control disciplinary cases where the alcoholic beverages licenses have attempted to raise First Amendment contentions in connection with *non-verbal* sexual conduct or displays on state licensed alcoholic beverages premises. *Meacham dba "Barbary Coast" v. California Department of Alcoholic Beverage Control*, 393 U.S. 855 (1968); *Probro, Inc. v. Department of Alcoholic Beverage Control of California*, 392 U.S. 855 (1968); *Keller v. California Department of Alcoholic Beverage Control*, 400 U.S. 806 (1970); and see *Derrington v. City of Portland*, (Ore.) 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

**B. IMPORTANT AND SUBSTANTIAL STATE INTERESTS ARE INVOLVED IN THE PREVENTION AT STATE LICENSED ON-SALE ALCOHOLIC BEVERAGES PREMISES OF: IMPROPER AND UNLAWFUL CONDUCT BY EMPLOYEES AND BETWEEN EMPLOYEES AND CUSTOMERS; "B-GIRL" ACTIVITY; PROSTITUTION; NARCOTIC AND DANGEROUS DRUG OFFENSES; VIOLENT CRIMES; EXPLOITATION OF THE CUSTOMERS; OVERT SEX OFFENSES; INTEMPERANCE; PRESENCE OF MINORS; ASSAULTS ON POLICE OFFICERS; AND OTHER SERIOUS AND EXTENSIVE LAW ENFORCEMENT PROBLEMS**

Regulation and control over the conditions surrounding the sale and service of alcoholic beverages in California is statutorily declared by the California Legislature to involve "an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State," and "involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people."<sup>7</sup>

The importance of alcoholic beverage control in California is further evidenced by the people's direct establish-

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7. Section 23001, Calif. Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code).

ment of the California Department of Alcoholic Beverage Control in the California Constitution and the self-executing, direct constitutional grant of power from the people of California to the Department of Alcoholic Beverage Control to suspend or revoke alcoholic beverages licenses upon the Department's determination that continuance of the licenses would be contrary to the public welfare or morals.<sup>8</sup>

Also pertinent to the instant case are the following California alcoholic beverage control statutes:

Section 23958 of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) which provides as to alcoholic beverages licenses that the Department of Alcoholic Beverage Control shall investigate all matters which may affect public welfare and morals and which specifically sets forth:

“The department further may deny an application for a license if issuance of such license would tend to create a law enforcement problem, . . .”

Sections 24200.5(a) and (b) of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) *mandate* revocation of an alcoholic beverages license for either sale of narcotics or dangerous drugs on licensed premises (§ 24200.5(a)) or the employing or permitting of persons to solicit or encourage others, directly or indirectly, to buy them drinks on the licensed premises—“B-girl” activity (§ 24200.5(b)).

Section 25601 of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) prohibits the suffering or use of licensed premises as a “disorderly house

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8. California Constitution, Article XX, Section 22. The constitutional grant of power to the Department is further augmented by an identical statutory grant of power to the Department from the California Legislature. California Alcoholic Beverage Control Act, Sections 24200(a) and 25750 (Div. 9, Calif. Bus. & Prof. Code).

or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, . . .”

Section 25657 of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) makes it unlawful to employ any hostess or entertainer for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages.

So-called “B-girl” activity is also made unlawful by Section 303 of the California Penal Code. Likewise, many of the proscribed acts and conduct such as sodomy, oral copulation, et cetera, are violations of the California Penal Code.

Lastly, but not necessarily all inclusive, we would point to section 25665 of the California Alcoholic Beverage Control Act which prohibits persons under 21 years of age being on on-sale *public premises*, that is, on licensed premises which are not also bona fide restaurants. If only a bar, minors are allowed on the premises if they have lawful business thereon. Minors are permitted on bona fide eating premises.

Hence, it should be kept in mind that as to alcoholic beverages premises California constitutional and statutory provisions concern themselves with, among other things: public welfare, public morals, law enforcement problems, “B-girl” activity, narcotics, dangerous drugs, minors and promotion of temperance.

With reference then to the various facts shown in the legislative hearing record and exhibits (see the Statement of the Case, supra, pages 5-9), it is readily apparent that the activities attendant to and resulting from the employment of such sexually oriented acts, conduct and displays on on-sale alcoholic beverage premises are clearly contrary to important State interests as to the conditions surround-

ing the sale and consumption of alcoholic beverages on state licensed alcoholic beverages premises.

The instant regulations further substantiate State interests by preventing the employment and use of such conduct and displays on on-sale alcoholic beverages premises, thereby removing the catalysts which, when added to the sale and consumption of alcoholic beverages, induce and produce such adverse results. In such an important and sensitive area as alcoholic beverage control, the State should not be required to have to wait and allow the resultant injurious activities to occur and then discipline the alcoholic beverages licensee only after the harm to the California public has already occurred.

**C. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL'S INTERESTS ARE UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION**

The regulations proscribe permitting certain non-verbal acts, conduct and visual displays on on-sale alcoholic beverages premises. The purpose of the regulations is to prevent the attendant and resulting injuries to the State's interests which experience has shown are induced when such conduct and displays are mixed with customers who are consuming alcoholic beverages.

Furthermore, the proscribed non-verbal acts and conduct, and the visual displays thereof, have no recognized symbolic speech element.

**D. THE REGULATIONS PROSCRIBE PERMITTING CERTAIN SPECIFIED NON-VERBAL ACTS AND CONDUCT, AND THE VISUAL DISPLAYS THEREOF, ON ON-SALE ALCOHOLIC BEVERAGES PREMISES. SUCH RESTRICTIONS ARE NO GREATER THAN THOSE ESSENTIAL TO FURTHER THE STATE'S INTERESTS**

The regulations confine themselves to specified non-verbal acts and conduct, and the visual displays thereof, on on-sale alcoholic beverages premises.

The regulations do not embody a blanket proscription against dancing, motion pictures or other forms of entertainment; nor do they concern themselves with the employ-

ment, use or display of such acts, conduct and visual reproductions on any premises in the State other than an on-sale alcoholic beverages premises.

**IV. A Federal Court May Not Invalidate and Enjoin Otherwise Valid State Regulations by Assuming That Improper Motives Prompted Such Enactments**

Selecting limited excerpts from various statements in the legislative hearing record, the majority of the District Court *assumed* that the motive behind the enactment of the regulations was not to deter the consequences set forth by the Department but rather to circumvent *obscenity* proof requirements. (App. )

Reliance on such a basis for invalidation of State regulations is contra to the well established rule that the courts may not defeat otherwise valid enactments by assuming that improper motives prompted such enactments. *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Palmer v. Thompson*, 398 U.S. 948 (1970); *Barenblatt v. United States*, 360 U.S. 109, 132 (1959).

**CONCLUSION**

For the reasons stated it is respectfully submitted that the judgment of the court below enjoining the enforcement of California Department of Alcoholic Beverage Control Regulations 143.3 and 143.4 should be reversed.

Dated: February 14, 1972

EVELLE J. YOUNGER  
Attorney General of the  
State of California

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(Appendix follows)

## ***Appendix***

California Department of Alcoholic Beverage Control  
Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California  
Administrative Code, §§ 143.2, 143.3, 143.4 and 143.5) were  
enacted and filed with the California Secretary of State  
(Register 70, No. 28) on July 9, 1970.

**"143.2. Attire and Conduct.** The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast, below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

*Appendix*

143.3. Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.4. Visual Displays. The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.5. Ordinances. Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance."

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### CALIFORNIA ET AL. v. LARUE ET AL.

#### APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 71-36. Argued October 10, 1972—Decided December 5, 1972

Following hearings, the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the proscribed entertainment could not be classified as obscene or lacking a communicative element. *Held:* In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. Pp. 5-10.

326 F. Supp. 348, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion. DOUGLAS, BRENNAN, and MARSHALL, JJ., filed dissenting opinions.

**NOTICE:** This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 71-36

California et al., Appellants, | On Appeal from the United  
v. | States District Court for  
Robert LaRue et al. | the Central District of  
California.

[December 5, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Article XX, § 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment which might be presented in bars and night clubs which it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of 28 U. S. C. §§ 1331, 1333, 2201, 2202, and 42 U. S. C. § 1983. A three-judge court was convened in accordance with 28 U. S. C. §§ 2281 and 2284, and the majority of that Court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution.<sup>1</sup>

<sup>1</sup> Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of

Concerned with the progression in a few years' time from "topless" dancers to "bottomless" dancers and other forms of "live entertainment" in bars and nightclubs which it licensed, the Commission heard a number of witnesses on this subject at public hearings held prior to the promulgation of the rules. The majority opinion of the District Court described the testimony in these words:

"Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers . . . ."

References to the transcript of the hearings submitted by the Department to the District Court indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

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state law. As the District Court recognised, however, such a claim is not cognizable in the suit brought by these appellees under 42 U. S. C. § 1983.

At the conclusion of the evidence, the Department promulgated the regulations here challenged, imposing standards as to the type of entertainment which could be presented in bars and nightclubs which it licensed. Those portions of the regulations found to be unconstitutional by the majority of the District Court prohibited the following kinds of conduct on licensed premises:

- (a) The performance of acts, or simulated acts, of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law";
- (b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus, or genitals";
- (c) The actual or simulated "displaying of the pubic hair, anus, vulva or genitals";
- (d) The permitting by a licensee of "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus"; and, by a companion section,
- (e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4.\*

Shortly before the effective date of the Department's regulations, appellees unsuccessfully sought discretionary

\* In addition to the regulations held unconstitutional by the court below, appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3 (2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment which violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding "that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers dance on a stage is not invalid." 326 F. Supp. 348, 350-351.

review of them in both the State Court of Appeals and in the Supreme Court of California. The Department then joined with appellees in requesting the three-judge District Court to decide the merits of appellees' claims that the regulations were invalid under the Federal Constitution.<sup>3</sup>

The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged their freedom of expression guaranteed to them

<sup>3</sup> MR. JUSTICE DOUGLAS in his separate opinion suggests that the District Court should have declined to adjudicate the merits of appellees' contention until the appellants had given the "generalized provisions of the Rules . . . particularized meaning." Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose *cur inquiry* into the existence of an "actual controversy" within the meaning of 28 U. S. C. § 2201 and Art. III, § 2, cl. 1 of the Constitution.

By pretrial stipulation, the appellees admitted they offered performances and depictions on their licensed premises which were proscribed by the challenged Rules. Appellants stipulated they would take disciplinary action against the licenses of licensees violating such Rules. In similar circumstances, this Court held that where a state commission had "plainly indicated" an intent to enforce an act which would affect the rights of the United States, there was a "present and concrete" controversy within the meaning of 28 U. S. C. § 2201 and of Art. III. *California Commission v. United States*, 355 U. S. 534, 539 (1958). The District Court therefore had jurisdiction of this action.

Whether this Court should develop a nonjurisdictional limitation on actions for declaratory judgments to invalidate statutes on their face is an issue not properly before us. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). Certainly a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by the appellees, see, e. g., *Zwickler v. Koota*, 389 U. S. 241 (1967); *Kepishian v. Board of Regents*, 385 U. S. 589 (1967); *Baggett v. Bullitt*, 377 U. S. 360 (1964), and we are not inclined to reconsider the procedural holdings of those cases in the absence of a request by a party to do so.

by the First and Fourteenth Amendments to the United States Constitution. It reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the *Roth* line of decisions in this Court, or else as a regulation of "conduct" having a communicative element in it under the standards laid down by this Court in *United States v. O'Brien*, 391 U. S. 367 (1968). Concluding that the regulations would bar some entertainment which could not be called obscene under the *Roth* line of cases, and that the governmental interest being furthered by the regulations did not meet the tests laid down in *O'Brien*, the Court enjoined the enforcement of the regulations. 326 F. Supp. 348. We noted probable jurisdiction. — U. S.

The state regulations here challenged come to us not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. In *Seagram and Sons v. Hostetter*, 384 U. S. 35, 41 (1966), this Court said:

"Consideration of any State law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'the transportation or importation to any State, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'"

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. 324,

330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." Still earlier, the Court stated in *State Board v. Young's Market Co.*, 299 U. S. 59, 64 (1936):

"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In *Wisconsin v. Constantineau*, 400 U. S. 433 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking. But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. 324, 332 (1964).

A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place simultaneously in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence

from the hearings which it cited to the District Court, and mindful of the principle that in legislative rule-making the agency may reason from the particular to the general, *Assigned Car Cases*, 274 U. S. 564, 583 (1927), we do not think it can be said that the Department's conclusion in this respect was an irrational one.

Appellees insist that the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises. But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency which is itself the repository of the State's power under the Twenty-first Amendment. *Seagram and Sons v. Hostetter*, *supra*, at 48. Nothing in the record before us nor in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternate plan of regulation. The Department's choice of a prophylactic solution instead of one which would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 487-488 (1955).

We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation which would not be found obscene under *Roth* and subsequent decision of this Court. See, e. g., *Sunshine Book Co. v. Summerville*, 355 U. S. 372 (1958), rev'd per curiam, 249 F. 2d 114 (CADC 1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien*, *supra*.

Our prior cases have held that both motion pictures and theatrical productions are within the protection of the First and Fourteenth Amendments. In *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952), it was held that motion pictures are "included within the free speech and free press guarantees of the First and Fourteenth Amendments" though not "necessarily subject to the precise rules governing any other particular method of expression." 343 U. S., at 502-503. In *Schacht v. United States*, 398 U. S. 58, 63 (1970), the Court said with respect to theatrical productions:

"An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the government during a dramatic performance."

But as the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression which is directed to the accomplishment of an end which the State has declared to be illegal when such expression consists, in part, of "conduct" or "action," *Hughes v. Superior Court*, 339 U. S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949).<sup>4</sup> In *O'Brien, supra*, the Court suggested that the extent to which "conduct" was protected

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<sup>4</sup> Similarly, States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods, *Kovacs v. Cooper*, 336 U. S. 77 (1949), and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit. *Cox v. New Hampshire*, 312 U. S. 569 (1941). Other state limitations on the "time, manner and place" of the exercise of First Amendment rights have been sustained. See, e. g., *Cameron v. Johnson*, 390 U. S. 611 (1968), and *Cox v. Louisiana*, 379 U. S. 559 (1965).

by the First Amendment depended on the presence of a "communicative element," and stated:

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U. S., at 376.

The substance of the regulations struck down prohibit licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" which partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of Bacchanalian revelries which the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur simultaneously at premises which have licenses was not an irrational one. Given the added presumption in favor of

the validity of the state regulation in this area which the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.\*

The contrary holding of the District Court is therefore

*Reversed.*

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\* Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Seagram and Sons v. Hostetter, supra*, is equally in point here:

"Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid." *Seagram and Sons v. Hostetter, supra*, at 52.

# SUPREME COURT OF THE UNITED STATES

No. 71-36

California et al., Appellants,  
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Robert LaRue et al. } On Appeal from the United  
States District Court for  
the Central District of  
California.

[December 5, 1972]

MR. JUSTICE STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. *Seagram & Sons v. Hostetter*, 384 U. S. 35; *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. 324, 330; *Dept. of Revenue v. James Beam Co.*, 377 U. S. 341, 344, 348; *California v. Washington*, 358 U. S. 64; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132; *Mahoney v. Joseph Triner*, 304 U. S. 401; *State Board of Equalization v. Young's Market*, 299 U. S. 59. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates the First and Fourteenth Amendments. I cannot agree.

Every State is prohibited by these same Amendments from invading the freedom of the press and from impinging upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church

or the First Amendment business of the bookstore. It would simply be controlling the distribution of liquor, as it has every right to do under the Twenty-first Amendment. On the same premise, I cannot see how the liquor regulations now before us can be held, on their face, to violate the First and Fourteenth Amendments.\*

It is upon this constitutional understanding that I join the opinion and judgment of the Court.

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\*This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See *Wisconsin v. Constantineau*, 400 U. S. 433; *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. 324, 329-334; *Dept. of Revenue v. James Beam Co.*, 377 U. S. 341.

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[December 5, 1972]

**MR. JUSTICE DOUGLAS, dissenting.**

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the Rules on their face; no application of the Rules has in fact been made to respondents by the institution of either civil or criminal proceedings. While the case meets the requirements of "case or controversy" within the meaning of Art. III of the Constitution and therefore complies with *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, the case does not mark the precise impact of these Rules against licensees who sell alcoholic beverages in California. The opinion of the Court can, therefore, only deal with the Rules in the abstract.

The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or how narrowly these Rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play—Shakespearian perhaps or one in a more modern setting—in which, for example, "fondling" in the sense of the Rules appears. I cannot imagine that any such performance could constitutionally

be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amendment.<sup>1</sup> For, as stated by the Court, that Amendment did not supersede all other constitutional provisions "in the area of liquor regulations." Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden.

Chief Justice Hughes stated the controlling principle in *Electric Bond & Share Co. v. SEC*, 303 U. S. 419, 443:

"Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. . . ."

The same thought was expressed by Chief Justice Stone in *Federation of Labor v. McAdory*, 325 U. S. 450, 470-471. Some provisions of an Alabama law regulating labor relations were challenged as too vague and uncertain to meet constitutional requirements. The Chief Justice noted that state courts often construe state statutes so that in their application they are not open to constitutional objections. *Id.*, at 471. He said that for us to decide the constitutional question "by anticipating such an authoritative construction" would be either "to

<sup>1</sup> Section 2 of the Twenty-first Amendment reads as follows: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow." \* *Id.*, at 471. He added:

"In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes."

Those precedents suggest to me that it would have been more provident for the District Court to have declined to give a federal constitutional ruling, until and unless the generalized provisions of the Rules were given particularized meaning.

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\* Even in cases on direct appeal from a state court, when the decision below leaves unresolved questions of state law or procedure which bear on federal constitutional questions, we dismiss the appeal. *Rescue Army v. Municipal Court*, 331 U. S. 549.

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[December 5, 1972]

MR. JUSTICE BRENNAN, dissenting.

I dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, and also, no doubt, to some speech and conduct which are unprotected under our prior decisions. See *Memoirs v. Massachusetts*, 383 U. S. 413 (1966); *Roth v. United States*, 354 U. S. 476 (1957). The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But as MR. JUSTICE MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forego the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on the grant of a license. See *Perry v. Sindermann*, 408 U. S. 593 (1972); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Speiser v. Randall*, 357 U. S. 513 (1958). Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

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MR. JUSTICE MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein under a narrowly drawn scheme. But appellees challenge these regulations<sup>1</sup> on their face, rather than as

<sup>1</sup> Rule 143.3 (1) provides in relevant part:

"No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals."

Rule 143.4 prohibits "The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or the anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above."

applied to a specific course of conduct.<sup>2</sup> Cf. *Gooding v. Wilson*, 405 U. S. 518 (1972). When so viewed, I think it clear that the regulations are overbroad and therefore unconstitutional. See, e. g., *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965).<sup>3</sup> Although the State's

<sup>2</sup> This is not an appropriate case for application of the abstention doctrine. Since these regulations are challenged on their face for overbreadth, no purpose would be served by awaiting a state court construction of them unless the principles announced in *Younger v. Harris*, 401 U. S. 37 (1971), govern. See *Zwickler v. Koota*, 389 U. S. 241, 248-250 (1967). Thus far, however, we have limited the applicability of *Younger* to cases where the plaintiff has an adequate remedy in a pending criminal prosecution. See *Younger v. Harris*, *supra*, at 43-44. Cf. *Douglas v. City of Jeannette*, 319 U. S. 157 (1943). But cf. *Berryhill v. Gibson*, 331 F. Supp. 122, 124 (MD Ala.), probable jurisdiction noted *sub nom. Gibson v. Berryhill*, 408 U. S. 920 (1972). The California licensing provisions are, of course, civil in nature. Cf. *Hearn v. Short*, 327 F. Supp. 33 (SD Tex. 1971). Moreover, the *Younger* doctrine has been held to "have little force in the absence of a pending state proceeding." *Lake Carriers' Assn. v. MacMullan*, 406 U. S. 498, 509 (1972) (emphasis added). There are at present no proceedings of any kind pending against these appellees. Finally, since the *Younger* doctrine rests heavily on federal deference to state administration of its own statutes, see *Younger v. Harris*, *supra*, at 44-45, it is waivable by the State. Cf. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 329 (1964). California has nowhere mentioned the *Younger* doctrine in its brief before this Court, and when the case was brought to the attention of the attorney for the appellant during oral argument, he expressly eschewed reliance on it. In the court below, the State specifically asked for a federal decision on the validity of its regulations and stated that it did not think the court should abstain. See *LaRue v. California*, 326 F. Supp. 348, 351 (CD Cal. 1971).

<sup>3</sup> I am startled by the majority's suggestion that the regulations are constitutional on their face even though "specific future applications of [the statute] may engender concrete problems of constitutional dimension." (Quoting with approval *Joseph E. Seagram & Sons v. Hostetter*, 384 U. S. 35, 52 (1966).) Ever since *Thornhill v. Alabama*, 310 U. S. 88 (1940), it has been thought that statutes which trench upon First Amendment rights are facially void even if the conduct of the party challenging them could be prohibited under a more narrowly drawn scheme. See, e. g., *Baggett v. Bullitt*, 377

broad power to regulate the distribution of liquor and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner which broadly stifles First Amendment freedoms. Cf. *Shelton v. Tucker*, 364 U. S. 479, 488 (1960). Rather, as this Court has made clear "precision of regulation must be the touchstone" when First Amendment rights are implicated. *NAACP v. Button*, 371 U. S. 415, 438 (1963). Because I am convinced that these regulations lack the precision which our prior cases require, I must respectfully dissent.

## I

It should be clear at the outset that California's regulatory scheme does not conform to the standards which we have previously enunciated for the control of obscenity.<sup>4</sup> Before this Court's decision in *Roth v. United*

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U. S. 360, 366 (1964); *Coates v. City of Cincinnati*, 402 U. S. 611, 616 (1971); *NAACP v. Button*, 371 U. S. 415, 432-433 (1963).

Nor is it relevant that the State here "sought to prevent [Bacchanalian revelries]" rather than performances by "scantly clad ballet troupe[s]." Whatever the State "sought" to do, the fact is that these regulations cover both these activities. And it should be clear that a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute.

<sup>4</sup> Indeed, there are some indications in the legislative history that California adopted these regulations for the specific purpose of evading those standards. Thus, Captain Robert Devin of the Los Angeles Police Department testified that the Department favored adoption of the new regulations for the following reason: "While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance." See also Testimony of Roy E. June, City Attorney of the City of Costa Mesa; Testimony of Richard C. Hirsch, Office of Los Angeles County District Attorney.

States, 354 U. S. 476 (1957), some American courts followed the rule of *Regina v. Hicklin* [1868] L. R. 3 Q. B. 360 to the effect that the obscenity *vel non* of a piece of work could be judged by examining isolated aspects of it. See, e. g., *United States v. Kennerley*, 209 F. 119 (1913); *Commonwealth v. Buckley*, 200 Mass. 346, 86 N. E. 910 (1909). But in *Roth* we held that "the *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U. S., at 489. Instead, we held that the material must be "taken as a whole," *id.*, and, when so viewed, must appeal to a prurient interest in sex, patently offend community standards relating to the depiction of sexual matters, and be utterly without redeeming social value.<sup>1</sup> See *Memoirs v. Massachusetts*, 383 U. S. 413, 418 (1966).

Obviously, the California rules do not conform to these standards. They do not require the material to be judged as a whole and do not speak to the necessity of proving prurient interest, offensiveness to community

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<sup>1</sup> I do not mean to suggest that this test need be rigidly applied in all situations. Different standards may be applicable when children are involved, see *Ginsberg v. New York*, 390 U. S. 629 (1968), when a consenting adult possesses putatively obscene material in his own home, see *Stanley v. Georgia*, 394 U. S. 557 (1969), or when the material by the nature of its presentation cannot be viewed as a whole, see *Rabe v. Washington*, 405 U. S. 313, 317 n. 2 (1972) (Brennan, C. J., concurring). Similarly I do not mean to foreclose the possibility that even the *Roth-Memoirs* test will ultimately be found insufficient to protect First Amendment interests when consenting adults view putatively obscene material in private. Cf. *Redrup v. New York*, 386 U. S. 767 (1967). But cf. *United States v. Reidel*, 402 U. S. 351 (1971). But I do think that at very least, *Roth-Memoirs* sets an absolute limit on the kinds of speech which can be altogether read out of the First Amendment for purposes of consenting adults.

standards, or lack of redeeming social value. Instead of the contextual test approved in *Roth* and *Memoirs*, these regulations create a system of *per se* rules to be applied regardless of context: Certain acts simply may not be depicted and certain parts of the body may under no circumstances be revealed. The regulations thus treat on the same level a serious movie such as "Ulysses" and a crudely made "stag film." They ban not only obviously pornographic photographs, but also great sculpture from antiquity.\*

Roth held 15 years ago that the suppression of serious communication was too high a price to pay in order to vindicate the State's interest in controlling obscenity, and I see no reason to modify that judgment today. Indeed, even the appellant does not seriously contend that these regulations can be justified under the *Roth-Memoirs* test. Instead, California argues that its regulations do not concern the control of pornography at all. These rules, the State argues, deal with *conduct* rather than with *speech* and as such are not subject to the strict limitations of the First Amendment.

To support this proposition, appellant relies primarily on *United States v. O'Brien*, 391 U. S. 367 (1968), which upheld the constitutionality of legislation punishing the

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\* Cf. Fuller, *Changing Society Puts Taste to the Test*, *The National Observer*, June 10, 1972, at 24: "Context is the essence of esthetic judgment . . . . There is a world of difference between *Playboy* and less pretentious girly magazines on the one hand, and on the other, *The Nude*, a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark. People may be just as naked in one or the other, the bodies inherently just as beautiful, but the context of the former is vulgar, of the latter, esthetic.

"The same words, the same actions, that are cheap and tawdry in one book or play may contribute to the sublimity, comic universality, or tragic power of the others. For a viable theory of taste, context is all."

destruction or mutilation of selective service certificates. *O'Brien* rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever a person engaging in the conduct intends thereby to express an idea," and held that Government regulation of speech-related conduct is permissible "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376-377.

While I do not quarrel with these principles as stated in the abstract, their application in this case stretches them beyond the breaking point.<sup>7</sup> In *O'Brien*, the Court began its discussion by noting that the statute in question "plainly does not abridge free speech on its face." Indeed, even *O'Brien* himself conceded that facially the statute dealt "with conduct having no connection with speech."<sup>8</sup> 391 U. S., at 375. Here, the situation is quite different. A long line of our cases makes clear that motion pictures, unlike draft card burn-

<sup>7</sup> Moreover, even if the *O'Brien* test were here applicable, it is far from clear that it has been satisfied. For example, most of the evils which the State alleges are caused by appellees' performances are already punishable under California law. See n. 11, *infra*. Since the less drastic alternative of criminal prosecution is available to punish these violations, it is hard to see how "the incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further the State's interest.

<sup>8</sup> The Court pointed out that the statute "does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views . . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." 391 U. S., at 375.

ing, are a form of expression entitled to *prima facie* First Amendment protection. "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501 (1952) (footnote omitted). See also *Interstate Circuit, Inc. v. City of Dallas*, 390 U. S. 676 (1968); *Jacobellis v. Ohio*, 378 U. S. 184 (1964); *Pincus v. Pitchess*, 429 F. 2d 416 (CA9 1970), aff'd by equally divided court *sub nom.* *California v. Pinkus*, 400 U. S. 922 (1970). Similarly, live performances and dance have, in recent years, been afforded broad *prima facie* First Amendment protection. See, e. g., *Schacht v. United States*, 398 U. S. 58 (1970); *P. B. I. C. Inc. v. Byrne*, 313 F. Supp. 757 (Mass. 1970), vacated to consider mootness, 401 U. S. 987 (1971); *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968), cert. denied *sub nom.* *California v. Giannini*, 395 U. S. 910 (1969).

If, as these many cases hold, movies, plays, and dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is "speech" within the meaning of the First Amendment, but that the individual gestures of the actors are "conduct" which the State may prohibit. The State may no more allow movies while punishing the "acts" of which they are composed than it may allow newspapers while punishing the "conduct" of setting type.

Of course, I do not mean to suggest that anything which occurs upon a stage is automatically immune from state regulation. No one seriously contends, for

example, that an actual murder may be legally committed so long as it is called for in the script or that an actor may inject real heroin into his veins while evading the drug laws which apply to everyone else. But once it is recognized that movies and plays enjoy *prima facie* First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically. For while "[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities," they are "insufficient to justify such as diminishes the exercise of rights so vital" as freedom of speech. *Schneider v. State*, 308 U. S. 147, 161 (1939). Rather, in order to restrict speech, the State must show that the speech is "used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent." *Schenck v. United States*, 249 U. S. 47, 52 (1919). Cf. *Brandenburg v. Ohio*, 395 U. S. 444 (1969); *Dennis v. United States*, 341 U. S. 494 (1951).\*

When the California regulations are measured against this stringent standard, they prove woefully inadequate. The State defends its rules as necessary to prevent sex crimes, drug abuse, prostitution, and a wide variety of other evils. These are precisely the same interests which have been asserted time and again before this Court as justification for laws banning frank discussion of sex and which we have consistently rejected. In fact, the empirical link between sex-related entertainment and the criminal activity popularly associated with it

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\* Of course, the State need not meet the clear and present danger test if the material in question is obscene. See *Roth v. United States*, *supra*. But, as argued above, the difficulty with California's rules is that they do not conform to the *Roth* test and therefore regulate material which is not obscene. See pp. —, *supra*.

has never been proved and, indeed, has now been largely discredited. See, e. g., Report of the Commission on Obscenity and Pornography 27 (1972); Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). Yet even if one were to concede that such a link existed, it would hardly justify a broad-scale attack on First Amendment freedoms. The only way to stop murders and drug abuse is to punish them directly. But the State's interest in controlling material dealing with sex is secondary in nature.<sup>10</sup> It can control rape and prostitution by punishing those acts, rather than by punishing the speech which is one step removed from the feared harm.<sup>11</sup> Moreover, because First Amendment rights are at stake, the State must adopt this "less restrictive alternative" unless it can make a compelling demonstration that the protected activity

<sup>10</sup> This case might be different if the State asserted a primary interest in stopping the very acts performed by these dancers and actors. However, I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. *Griswold v. Connecticut*, 381 U. S. 479 (1965). Moreover, it is unnecessary to reach that question in this case since the State's regulations are plainly not designed to stop the acts themselves, most of which are in fact legal when done in private. Rather, the State punishes the acts only when done in public as part of a dramatic presentation. Cf. *United States v. O'Brien*, *supra*, at 375. It must be, therefore, that the asserted state interest stems from the effect of the acts on the audience rather than from a desire to stop the acts themselves. It should also be emphasized that this case does not present problems of an unwilling audience or of an audience composed of minors.

<sup>11</sup> Indeed, California already has statutes controlling virtually all of the misconduct said to flow from appellees' activity. See Calif. Penal Code § 647 (b) (prostitution); Calif. Penal Code §§ 261, 263 (rape), Calif. Bus. & Prof. Code § 25657 ("B-Girl" activity); Calif. Health & Safety Code §§ 11500, 11501, 11721, 11910, 11912 (sale and use of narcotics).

and criminal conduct are so closely linked that only through regulation of one can the other be stopped. Cf. *United States v. Robel*, 389 U. S. 258, 268 (1967). As we said in *Stanley v. Georgia*, 394 U. S., at 566-567, "if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .' *Whitney v. California*, 274 U. S. 357, 378 (1927) (Brandeis, J., concurring) . . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."<sup>12</sup>

## II

It should thus be evident that under the standards previously developed by this Court, the California regulations are overbroad: They would seem to suppress not only obscenity outside the scope of the First Amendment, but also speech which is clearly protected. But California contends that these regulations do not involve suppression at all. The State claims that its rules are not regulations of obscenity, but are rather merely reg-

<sup>12</sup> Of course, it is true that *Stanley* does not govern this case, since *Stanley* dealt only with the private possession of obscene materials in one's own home. But in another sense, this case is stronger than *Stanley*. In *Stanley*, we held that the State's interest in the prevention of sex crimes did not justify laws restricting possession of certain materials, even though they were conceded to be obscene. It follows a *fortiori* that this interest is insufficient when the materials are not obscene and, indeed, are constitutionally protected.

ulations of the sale and consumption of liquor. California points out that it does not punish establishments which provide the proscribed entertainment, but only requires that they not serve alcoholic beverages on their premises. The State vigorously argues that such regulation falls within its general police power as augmented, when alcoholic beverages are involved, by the Twenty-first Amendment.<sup>13</sup>

I must confess that I find this argument difficult to grasp. To some extent, it seems premised on the notion that the Twenty-first Amendment authorizes the States to regulate liquor in a fashion which would otherwise be constitutionally impermissible. But the Amendment by its terms speaks only to state control of the *importation* of alcohol, and its legislative history makes clear that it was intended only to permit "dry" States to control the flow of liquor across their boundaries despite potential Commerce Clause objections.<sup>14</sup> See generally

<sup>13</sup> The Twenty-first Amendment, in addition to repealing the Eighteenth Amendment, provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

<sup>14</sup> The text of the Amendment is based on the Webb-Kenyon Act, c. 90, 37 Stat. 699, which antdated prohibition. The Act was entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," and was designed to allow "dry" States to regulate the flow of alcohol across their borders. See, e. g., *McCormick & Co. v. Brown*, 286 U. S. 131, 140-141 (1932); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 324 (1917). The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

" . . . [T]he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regu-

*Joseph E. Seagram & Sons Inc. v. Hostetter*, 384 U. S. 35 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964). There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights. I submit that the framers of the Amendment would be astonished to discover that they had inadvertently enacted a *pro tanto* repealer of the rest of the Constitution. Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause. See *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 178-179 (1972). Cf. *Wisconsin v. Constantineau*, 400 U. S. 433 (1971); *Horneby v. Allen*, 326 F. 2d 605 (CA5 1964). I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.

To be sure, state regulation of liquor is important, and it is deeply embedded in our history. See, e. g., *Colonnade Catering Corp. v. United States*, 397 U. S. 72, 77 (1970). But First Amendment values are important as well. Indeed, in the past they have been thought so important as to provide an independent restraint on every power of Government. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943). Thus, when the Government attempted to justify a limitation on freedom of association by reference to the war power, we categorically rejected the attempt. "[The] concept of 'national defense'" we held, "cannot be deemed an end in itself, justifying any

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lation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (1933) (remarks of Senator Blaine).

exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes defense of the Nation worthwhile." *United States v. Robel*, *supra*, at 264. Cf. *New York Times Co. v. United States*, 403 U. S. 713, 716-717 (1971) (opinion of Mr. Justice Black); *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 426 (1934). If the First Amendment limits the means by which our Government can ensure its very survival, then surely it must limit the State's power to control the sale of alcoholic beverages as well.

Of course, this analysis is relevant only to the extent that California has in fact encroached upon First Amendment rights. The State argues that no such encroachment has occurred, since appellees are free to continue providing any entertainment they choose without fear of criminal penalty. Appellant suggests that this case is somehow different because all that is at stake is the "privilege" of serving liquor by the drink.

It should be clear, however, that the absence of criminal sanctions is insufficient to immunize state regulation from constitutional attack. On the contrary, "this is only the beginning, not the end, of our inquiry." *Sherbert v. Verner*, 374 U. S. 398, 403-404 (1963). For "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.*, at 404. As we pointed out only last

Term, “[f]or at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.” *Perry v. Sindermann*, 408 U. S. 593, 597 (1972).

Thus, unconstitutional conditions on welfare benefits,<sup>15</sup> unemployment compensation,<sup>16</sup> tax exemptions,<sup>17</sup> public employment,<sup>18</sup> bar admissions,<sup>19</sup> and mailing privileges<sup>20</sup> have all been invalidated by this Court. In none of these cases were criminal penalties involved. In all of them, citizens were left free to exercise their constitutional rights so long as they were willing to give up a “gratuity” which the State had no obligation to provide. Yet in all of them, we found that the discriminatory provision of a privilege placed too great a burden on

<sup>15</sup> See *Shapiro v. Thompson*, 394 U. S. 618 (1969). But cf. *Wyman v. James*, 400 U. S. 309 (1971).

<sup>16</sup> See *Sherbert v. Verner*, 374 U. S. 398 (1963).

<sup>17</sup> See *Speiser v. Randall*, 357 U. S. 513 (1958).

<sup>18</sup> See, e. g., *Pickering v. Board of Education*, 391 U. S. 563 (1968); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Baggett v. Bullitt*, 377 U. S. 360 (1964).

<sup>19</sup> See, e. g., *Baird v. State Bar of Arizona*, 401 U. S. 1 (1971); *Konigsberg v. State Bar*, 353 U. S. 252 (1957); *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957). But cf. *Law Students Civil Rights Research Council v. Wadmond*, 401 U. S. 154 (1971); *Konigsberg v. State Bar*, 366 U. S. 36 (1961).

<sup>20</sup> See, e. g., *Blount v. Rizzi*, 400 U. S. 410 (1971); *Hannegan v. Esquire Inc.*, 327 U. S. 146, 156 (1946).

constitutional freedoms. I therefore have some difficulty in understanding why California nightclub proprietors should be singled out and informed that they alone must sacrifice their constitutional rights before gaining the "privilege" to serve liquor.

Of course, it is true that the State may in proper circumstances enact a broad regulatory scheme which incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors of theatres and bookstores would be constitutionally entitled to a special dispensation. But in that event, the classification would not be speech-related and, hence, could not be rationally perceived as penalizing speech. Classifications which discriminate against the exercise of constitutional rights *per se* stand on an altogether different footing. They must be supported by a "compelling" governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted. See, e. g., *Shapiro v. Thompson*, 394 U. S. 618, 634 (1969).

Moreover, not only is this classification speech-related; it also discriminates between otherwise indistinguishable parties on the basis of the *content* of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics while maintaining their licenses. But if they choose to deal with sex, they are treated quite differently. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion. See, e. g., *Cox v. Louisiana*, 379 U. S. 536, 556-558 (1965). Whether this test is thought to derive from equal protection analysis, see *Police Department of the City of Chicago v. Mosley*, 408 U. S. 92 (1972); *Niemotko v. Maryland*, 340 U. S. 268 (1951), or directly from the substantive constitutional provision involved,

see *Cox v. Louisiana*, *supra*; *Schneider v. State*, *supra*, the result is the same: any law which has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . [is] patently unconstitutional." *United States v. Jackson*, 390 U. S. 570, 581 (1968).

As argued above, the constitutionally permissible purposes asserted to justify this statute are too remote to satisfy the Government's burden when First Amendment rights are at stake. See —, *supra*. It may be that the Government has an interest in suppressing lewd or "indecent" speech even when it occurs in private, among consenting adults. Cf. *United States v. Thirty-seven Photographs*, 402 U. S. 363, 376 (1971). But cf. *Stanley v. Georgia*, *supra*. But that interest must be balanced against the overriding interest of our citizens in freedom of thought and expression. Our prior decisions on obscenity set such a balance and hold that the Government may suppress expression treating with sex only if it meets the three-pronged *Roth-Memoirs* test. We have said that "the door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Roth v. United States*, *supra*, at 488. Because I can see no reason why we should depart from that standard in this case, I must respectfully dissent.

Supreme Court, U. S.  
FILED

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-36

DEC 30 1972

MICHAEL RODAK, JR., CL

STATE OF CALIFORNIA, DEPARTMENT  
OF ALCOHOLIC BEVERAGE CONTROL,  
et al.,

Appellants,

vs.

ROBERT LARUE, et al.,

Appellees and Petitioners.

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**PETITION FOR REHEARING**

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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PETITION FOR REHEARING

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I

THE TWENTY-FIRST AMENDMENT GRANTS  
NO AUTHORITY TO STATES TO CONDITION  
THE RIGHT TO SELL ALCOHOLIC BEVER-  
AGES ON A WAIVER OF FIRST AMENDMENT  
RIGHTS

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In this petition we shall show that the  
majority's reliance on the Twenty-First

Amendment to validate Rules 143.3 and 143.4 is mistaken and erroneous. We shall show that the sole purpose and effect of repeal was to return to the states the regulatory authority held by them prior to prohibition under their domestic police power as amplified the Webb-Kenyon Act, without the grant of any further authority or power.

Without specifying its exact effect, the majority relies on the Twenty-First Amendment as a grant of authority to the states to admittedly abridge First-Amendment rights.<sup>1/</sup> The majority's conclusions

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1/ "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." Opinion, p. 5.

"But the case for upholding State regulation in the area covered by the Twenty-First Amendment is undoubtedly strengthened by that enactment. . . ." Opinion, p. 6.

"Given the added presumption in favor of the validity of the state

are neither by citation to previous case authority involving abridgement of fundamental rights nor by citation to authority, history or reasoned analysis. To the contrary, the error of the majority opinion is shown with surprising unanimity in both the congressional debates on the Twenty-First Amendment and in the decisions of this Court.

Section 2 of the Twenty-First Amendment was based upon the Webb-Kenyon Act<sup>2/</sup> - its purpose was to enshrine in the Constitution the right of states to prohibit or regulate the importation of alcoholic beverages free of limitations flowing from the commerce clause. Indeed, the initial draft of the Twenty-First Amendment introduced in the Senate made express reference to the commerce clause.<sup>3/</sup> Its sponsor described it

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1/ Continued:

regulation in this area which the Twenty-First Amendment requires,  
. . ." Opinion, pp. 9-10.

2/ 27 U.S.C. §122.

3/ 74 Cong. Rec., p. 65. It provided, in relevant part, "The provisions of clause 3 of section 8 of Article I of the Constitution . . . shall not be construed. . . ."

as proposing "to amend the interstate commerce law so as to make intoxicating liquor for beverage or other purposes, for use in States which prohibit intoxicating liquors, subject to the laws of such States, leaving all other States which choose to adopt any system of liquor control free to legislate without any constitutional inhibition or control by the Congress."<sup>4/</sup>

When the resolution was reported out of committee, Section 2 had been rewritten as later enacted,<sup>5/</sup> but its sponsor continued to describe its effect in the original terms.<sup>6/</sup> Throughout the debate in the Senate, both proponents and opponents of repeal clearly expressed their understanding that Section 2 was intended solely to permit States to legislate free of commerce clause restrictions, and with Federal help

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4/ 74 Cong. Rec., p. 64, Statement of Sen. Blaine.

5/ 74 Cong. Rec., p. 1621.

6/ 74 Cong. Rec. p. 4141. Sen. Blaine said, "This proposal is restoring to the States, in effect, the right to regulate commerce, respecting a single commodity - namely, intoxicating liquor."

against out of State bootleggers.<sup>7/</sup> Section 2 was expressly described by Sen. Borah as incorporating the Webb-Kenyon Act into the Constitution.<sup>8/</sup>

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7/ Sen. Fess, an opponent of repeal, observed, ". . . the second section . . . is designed to permit the Federal authority to assist the States that want to be dry to remain dry." 74 Cong. Rec. p. 4168.

Sen. Borah, a leading opponent of repeal said in discussing Section 2:

"I have no doubt, if the amendment is adopted, that it will be within the power of Congress, as well as within the power of the State, to punish those who ship liquor into a dry state."  
74 Cong. Rec. p. 4172.

A proponent, Sen. Walsh, said,  
"The purpose of the provision . . . was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of consignee as well as thereafter." 74 Cong. Rec. p. 4219.

8/ "I venture the opinion, and it is my belief that the Eighteenth Amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of dry States by the liquor interests outside those States. At the time the Eighteenth Amendment was adopted, 33

(Continued)

Since Section 2 of the Twenty-First Amendment serves to embed a concise form of the Webb-Kenyon Act in the Constitution, cases interpreting that Act are clearly germane. State of Georgia v. Wenger, 94 F. Supp. 976 (D.C. Ill. 1950), cert. denied

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8/ Continued:

States had prohibition in some form. The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These states were invaded, their laws broken, their officials corrupted, by the same influences which now plead for States rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local government, States rights, the right of the People of the respective states to adopt their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

"All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas [Sen. Robinson] was seen fit to recognize the justice and fairness to the States of incorporating it permanently into the Constitution of the United States." 74 Cong. Rec. p. 4172.

342 U.S. 822. Those decisions clearly reflect the precise and limited purpose of the Act. In Adams Express Co. v. Kentucky, 238 U.S. 190 (1915) it was held that the Webb-Kenyon Act did not prohibit all shipments of liquor into States with prohibitory laws, but only those shipments made with intent to violate local law. In that case a State law prohibiting shipment of liquor by public or private carrier was held not applicable to an interstate shipment intended for personal use of the consignee when such personal use was itself legal under state law. The Webb-Kenyon Act was held to be a constitutional exercise of the power of Congress to permit state regulation of interstate commerce in James Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917), which also held that an express prohibition of interstate shipment for personal use was proper under the Act. In McCormick & Co. v. Brown, 286 U.S. 131 (1932) this Court held that the Webb-Kenyon Act was neither repealed nor modified by the Eighteenth Amendment and, as a result, States could prohibit interstate commerce in all intoxicating liquors

as defined under State law, unlimited by the less-restrictive provisions of the National Prohibition Act. The Webb-Kenyon Act was described at page 142 of that opinion as being intended to aid the enforcement of state prohibitory laws.

The proposition that the Twenty-First Amendment did not grant any power to the States other than the power to exercise domestic police power free from the restrictions of the Commerce Clause is buttressed by the Senate debate over proposed Section 3, which was deleted from the Amendment. Section 3 would have given concurrent power to Congress and the states to regulate or prohibit sale for consumption on the premises.<sup>9/</sup> It was not included in the Twenty-First Amendment because it would compromise the full restoration to the states of their rights over intoxicating liquor<sup>10/</sup> and would leave open the

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9/ 74 Cong. Rec. p. 1621.

10/ Sen. Blaine said,

"The purpose of Section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting

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possibility of national prohibition,<sup>11/</sup> on the one hand, or national repeal<sup>12/</sup> on the other. It must be remembered that the Eighteenth Amendment had taken from the states all power to regulate intoxicating liquors in a manner conflicting with national prohibition. Vigliotti v. Pennsylvania, 258 U.S. 403 (1922). Thus the Twenty-First Amendment was viewed as a

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10/ Continued:

intoxicating liquors which enter the confines of the States. Thus the States under Section 2 may enact certain laws on intoxicating liquors, and Section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection while under Section 3 the proposal is to take away from the States the powers that the States would have in the absence of the Eighteenth Amendment. My view therefore is that Section 3 is inconsistent with Section 2, and the two sections are incompatible, and that Section 3 ought to be taken out of the resolution."

11/ See remarks of Sen. Wagner at 74 Cong. Rec. p. 4147.

12/ See remarks of Sen. Black at 74 Cong. Rec. p. 4177.

restoration of power which the States had previously had rather than a grant of new power to them.<sup>13/</sup> The defeat of Section 13 left the Twenty-First Amendment devoid of any grant of power over sales by the drink either to the states or the Federal Government, the restoration of state power being effected by Section 1, which repealed the Eighteenth Amendment.<sup>14/</sup>

This legislative history has been respected by all previous decisions of this Court which have interpreted the Twenty-First Amendment. Not only has the effect of Section 2 been limited to the control of imports into states,<sup>15/</sup> but the court has

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13/ As Sen. Wagner observed, "The problem confronting us, Mr. President is to choose between two alternative courses. Either the Control of the local liquor traffic is to remain in the Federal Government or is to be restored to the States." 74 Cong. Rec. 4148.

14/ The Senate also rejected proposals which would have restricted State power by constitutionally prohibiting sales for consumption on the premises. 74 Cong. Rec. p. 4225.

15/ State Board of Equalization v. Youngs Market, 299 U.S. 59 (1936) where the court said,

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eschewed reliance on it when ruling on other exercises of State power.<sup>16/</sup> Thus there

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15/ Continued:

"The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquor."

Mahoney v. Joseph Triner Corporation, 304 U.S. 401 (1938) in which the court held that unreasonable discrimination against imported liquor was permissible.

Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) in which the court upheld a retaliatory law prohibiting imports from states which prohibit imports.

Zifferin Inc. v. Reeves, 308 U.S. 132 (1939) in which the court said,

"The Twenty-First Amendment sanctions the right of the state to legislate concerning intoxicating liquors brought from without unfettered by the commerce clause."

16/ Duckworth v. State of Arkansas, 314 U.S. 390 (1941) in which a permit requirement for through shipments of alcoholic beverages was approved as a reasonable regulation on local shipment without regard to the Twenty-First Amendment.

Carter v. Commonwealth of Virginia, 321 U.S. 131 (1944), another through shipment case, in which the court said,

(Continued)

are no cases in which the court has sanctioned State violation of any constitutional provision as a result of the Twenty-First Amendment, except those expressly relating to the commerce clause.

Rules 143.3 and 143.4 concededly violate the First Amendment and could not be upheld, for the reasons already stated in appellee's brief, in the absence of the majority's mistaken reliance on the Twenty-First Amendment.

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16/ Continued:

"we are satisfied that Virginia may, notwithstanding the Commerce Clause and independently of the Twenty-First Amendment, in order to protect herself from illicit liquor traffic within her borders, subject the shipment of liquor through Virginia to the regulations here in question.

Goesaert v. Cleary, 335 U.S. 464 (1948), in which an equal protection attack against regulation of female bartenders was approved under the Fourteenth Amendment, as not being an "irrational discrimination." No First Amendment claims were made in that case.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), which held that the Twenty-First Amendment did not permit imposition of a state tax on sales of liquor in foreign commerce. The majority's reliance on this case seems unjustified in view of its result.

The majority opinion would appear to authorize a wide variety of restrictions on fundamental rights in the guise of liquor regulations. For example:

- Rules requiring bars to be racially segregated, justified as an aid in avoiding fights and other disturbances.
- Rules requiring the issuance of licenses to churches for use of sacramental wine, justified as an aid to enforcement of other license laws.
- Rules prohibiting the playing of rock music or Wagnerian operas on licensed premises, as a means of noise control.
- Rules requiring licensees to conspicuously post copies of the Lord's Prayer and forbidding issuance of licenses to atheists, justified as an aid to temperance.
- Rules forbidding sale of packaged liquor to persons who privately possess visual representations described in California Rule 143.4, justified as an aid in preventing

rapes and indecent exposures.

Under the majority decision, restrictions on fundamental rights such as those described above would only have to satisfy the most liberal due process test in order to pass constitutional muster. Such a result is wholly contrary to countless decisions of this Court and wholly unsupported by the Twenty-First Amendment.

Respectfully submitted,

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I, KENNETH SCHOLTZ, hereby certify that  
this petition is presented in good faith  
and not for the purpose of delay.

/s/ Kenneth Scholtz

KENNETH SCHOLTZ